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CASES

DECIDED IN THE

Supreme Court of Ohio

AT THE

SPECIAL SESSIONS IN COLUMBUS

DECEMBER, 1831, 1832

REPORTED IN CONFORMITY WITH THE ACT OF ASSEMBLY

By CHARLES HAMMOND
ATTORNEY AT LAW

VOLUME V

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CINCINNATI
ROBERT CLARKE & CO.
1872

Rec. June 6, 1887

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CASES

DECIDED BY THE

Supreme Court of Ohio,

BEFORE ALL THE JUDGES,

AT A SPECIAL SESSION HOLDEN IN COLUMBUS, DEC., 1831.

Benjamin Hess *v.* The State of Ohio.

Teller of a bank competent witness to testify concerning the handwriting of president and cashier.

Persons skilled in a knowledge of handwritings competent to testify concerning them, although they never saw the parties write.

Whether a bank note offered in evidence on an indictment for counterfeiting be subscribed H. or N. Biddle is a question of fact, and the decision upon it can not be raised in error, unless the note accompanies the record. *Quære*, if it can be alleged as error.

An indictment for counterfeiting need not set out an indorsement upon the counterfeited paper.

In prosecution for having counterfeit notes in possession, proof that other counterfeits were found secreted in prisoner's house, and in possession of his wife, is admissible.

Indictment against two, one only put upon trial. It is not error if it can be justly inferred from the record that an order for a separate trial was made, though it does not appear in form upon the record. Two may be joined in indictment for having counterfeit notes in possession.

Hess v. State of Ohio.

An indictment for having counterfeit bank notes in possession, and for making sale of them, need not charge that the sale was for a consideration, or to the injury of any one, or that the notes were indorsed. And if such acts are charged to be felonious, it is not error.

THIS cause came before the court upon a writ of error to the court of common pleas of Clermont county, and was adjourned for decision at Columbus. It was submitted without argument. The case is fully stated by Judge WRIGHT, in the opinion of the court delivered by him.

Judge WRIGHT:

Hess, the plaintiff in error, was indicted in the court of common pleas, jointly with one Hoyt, upon several charges:

1. For feloniously selling and delivering to one Steele a counterfeit *bank note*, purporting to be a check from the Bank of the United States branch at Cincinnati upon the Bank of the United States, signed J. Reynolds, president, and P. Benson, cashier, for five dollars, and payable to order, knowing it to be counterfeit.

2. For the feloniously selling and delivering to Steele a counterfeit note, purporting to be a twenty-dollar note issued by the Bank of the United States, payable to order, and signed by H. 6] *Biddle, president, and W. McIlvaine, cashier, knowing it to be counterfeit.

3. For having in possession, for the purpose of selling, etc., divers counterfeit notes, viz: two twenties, purporting to be of the Bank of the United States, issued by H. Biddle, president, and W. McIlvaine, cashier, and payable *to order;* and a five-dollar check from the United States branch at Cincinnati upon the Bank of the United States, and signed J. Reynolds, president, and P. Benson, cashier, and payable to order, knowing them to be counterfeit.

The first two charges were framed upon that clause of section 29 of the act for the punishment of crimes, vol. xxix. 141, which provides a punishment for any person who "shall sell, barter, or in any manner dispose of any false, forged, or counterfeit bank note or notes." The third charge is framed under that clause of the same section providing punishment for any person who "shall be detected with any such bank-notes in his possession, for the purpose of selling, bartering, or disposing of the same."

During the trial of this cause, several bills of exception were

tendered and signed by the court. After verdict, objections were made in arrest, but the court sentenced the defendant to confinement in the penitentiary for three years, the shortest time known to the law. The case here presents two classes of errors, which, it is claimed for the prisoner, vitiate the sentence of the court—those attending the admission of evidence on the trial, and those appearing on the record. I will consider them in their order:

1. Upon the trial, one Gano was called as a witness for the prosecution to prove the counterfeit character of the twenty-dollar notes. He testified that he had never seen the president or cashier write, but was a teller in the Cincinnati branch, and had frequently seen notes, letters, etc., received in the branch bank as genuine, with their signatures. He was then allowed to give his opinion to the jury that the notes were counterfeit. In this the prisoner claims the court erred. It is esteemed settled law that persons of skill may give their opinions, in evidence, in criminal cases, whether the particular handwriting on the instrument alleged to be forged is not true and genuine or forged and imitated, *because it is said a judgment upon such points may be formed [7 by habit and experience. 2 Stark. Ev. 570–586; Peake Ev. 35; 4 Esp. Cas. 117.

2. The same witness was called for the prosecution, and permitted to testify to the counterfeit character of the five-dollar checks, issued at Cincinnati. This was objected to, because better evidence was within reach of the power of the court, the president and cashier residing in an adjoining county. In admitting this evidence, the prisoner alleges the court erred. In England, a witness, whose name appears upon forged paper, and who is interested in setting aside the instrument, is not permitted to give evidence to prove the fact of forgery, though such person is held a competent witness to prove all collateral matters on the trial. 3 Stark. Ev. 584, 585; 2 N. R. 88; 2 Leach 987; 2 East, C. L. 995. But this is held not to extend to cases where the witness has no real interest in the conviction; thus the cashier of a bank, or other mere agent, may be called to prove the signature to a bank note not to be his, because he is, in fact, a mere indifferent party, who has no interest of his own. 1 Leach, 311; 3 Ch. C. L. 1043. But although you may call the agent, etc., you need not unless you please. 2 Stark. 585. The English rule that excludes a party whose name is forged from testifying to establish the forgery,

is adhered to in Connecticut, Vermont, New Hampshire, Pennsylvania, and North Carolina. 1 Root, 30, Swift's Ev. 70; 1 Tyler, 260; 1 N. H. 7; 2 N. H. 43; 3 N. H. 84; 2 Dall. 239; 2 Yeates, 1; 2 Hayw. 288. In these states, the practice has been uniform, we believe, to admit such witness, and also to admit the evidence of others skilled in examining signatures and notes. We see no reason for changing the rule. And the objection that secondary evidence is substituted for the *best*, does not apply to the case, since there is not such a distinction between one whose knowledge is of his own handwriting, and the knowledge of another's on the same subject, as constitutes the former evidence of a superior degree to the latter. 2 Stark. Ev. 586. The English rule was adopted in New York, 1794; but in 1809, in the People *v.* Howell, 4 Johns. 296, Ch. J. Kent says, since that time, the question of interest in a 8] witness, *has been investigated and defined with more precision, both in England and New York; that the exclusion of the party, in cases of forgery, has become an anomaly in the law of evidence, and it would seem to be fit and proper that the rule should be no longer applied.

3. Again, it is urged the bills offered to the jury varied from those described in the indictment, and so were improperly admitted to the jury. The variances now relied upon are: 1: In the signature of the president of the bank, the indictment describing a note signed H. Biddle, and the notes offered in evidence, bearing the name N. Biddle affixed to them. 2. That the notes offered to the jury were indorsed in these words, "pay the bearer, Thos. Wilson;" whereas the notes described in the indictment were not described as having any indorsement thereon. As to the first variance, the bill of exception shows that the court decided, that according to their judgment, the letter before Biddle, in the signature of the notes offered, was H., not N. The notes are not returned with the record, and we have no means of determining whether the court erred in judgment or not. It may be proper, however, to say in reference to this objection, that if the court did err, it was as to a matter of fact, and not of law. The question was properly submitted to the court to determine upon, as preliminary to the sending the notes to the jury; and the record shows their opinion to be, the letter was H., not N. How can we revise this opinion? Certainly not without the evidence was submitted to us—even if we then have a legal right to correct errors

of fact, of this kind, which every court must decide for itself, the accuracy of which the jury can examine into also. The rule doubtless is, that where the instrument is set out, as in this indictment, is its tenor or words, and not the purport only, the prosecution in held to strict proof, and the instrument offered, must appear on its face to be the same instrument described.

The omission to describe the indorsement on the note, and the appearance of the words, "pay the bearer, Thos. Wilson," on the back of the note, does not, in our opinion, present a question of variance. The indictment charges the defendant with having in possession divers counterfeit notes, *and then sets out the face [9 of the notes. The indorsement is not alluded to at all. The note might be counterfeit, and the indorsement genuine. The indorsement is not more a part of the note than the number, the figures in the margin, or the water-marks, and they need not be set out. Even in an indictment for forging a promissory note, the indorsement need not be set out, for it is no part of the note. 2 Mass. 393–397; 1 Mass. 62, 203. Neither shall it be required to set these things forth in an indictment for having them in possession. The variance objected to is not perceived. Other objections are made in the bill of exceptions; as that in the motto, alleged in the indictment to be "*pruribua unum*," when on the note the words are "*pluribus unum*." But these are not assigned for error, and are clearly of no consequence.

4. On the trial, the prosecutor, "to prove the guilty knowledge of the defendant, with respect to the bank notes described in the indictment," called a witness to prove that three days after the arrest of the prisoner, and while he was in jail, he found in an auger hole bored in a log of a house, within a few feet of the dwelling of the defendant, and which had formerly been his dwelling, two bank bills, which he produced; and the prosecutor claimed they were counterfeit, and they were suffered to go to the jury; and also called another witness, who stated that the evening after the defendant was arrested, he, the witness, went to his dwelling house, and took from the hands of his wife, a purse, which she said belonged to her little boy, which contained sixty dollars of counterfeit bank notes, which being produced, were suffered to go to the jury. In these instances it is objected that the court erred also; and that as to both matters the testimony was improper; and in the last, in permitting the statement of the wife to be given

in evidence to convict her husband, it is said, "violates all law, common sense, and common justice." If it be true that the court below has committed an error of this character, it should be speedily corrected. It can hardly be deemed necessary at this day to go into any course of reasoning to prove that circumstantial or presumptive evidence is allowed to prevail, even to the convicting of 10] an offender. In the language of *the writers on evidence, "it is essential to the well-being, at least, if not to the very existence of civil society, that it should be understood that the secrecy with which crimes are committed will not insure impunity to the offender." 1 Stark. Ev. 479. Such evidence is allowable, because it is, in its own nature, capable of producing the highest degree of moral certainty. Crimes of any magnitude are rarely committed without affording vestiges by which the offender may be traced; and very often the means he adopts for his security turn out to be the most cogent arguments of his guilt. 1 Stark. Ev. 480. There should, however, be a connection between the circumstance and the fact to be inferred; and the circumstance should tend to the conclusion which is intended to be deduced by the aid of reason and experience. Let us test the evidence in question by this rule. The prosecutor designed to convince the jury that the defendant knew the bank notes he had were counterfeit; and does it not strike every one at once that the finding other spurious notes of considerable amount about his house, secreted in the crevices of the logs, and in the hands of his wife, is a strong circumstance, unexplained, to conduct the mind to the conclusion that he knew of their bad character? It seems to us the evidence was competent and relevant. To what extent it would affect the jury, is not for us to inquire. Is the character of these circumstances changed by the declaration of the wife, testified to in the hearing of the jury? We can not see that they are. No one pretends that the declaration of a wife can be given in evidence, in such case, for or against her husband. It does not appear by the bill of exceptions that it was objected to until after given; but that is not very material. The wife's declaration was an incidental statement of the witness, no way material to the facts testified, and could not have influenced the jury to convict. Stripped of the declaration that the purse belonged to her little boy, the circumstances remain in full force. Connected with it they are neither enlarged nor diminished.

5. It is objected to the arraignment and trial of the defendant,

and the finding of the jury: 1. That Hess and Hoyt were arraigned and pleaded *jointly*, and that Hess was tried separately, without any further plea or order of court *for such separate [11 trial. 2. That Hess was found guilty, and Hoyt not noticed in the verdict, contrary to the issue and oaths of the jury. The record shows that Hess and Hoyt, being both arraigned, plead not guilty; and that immediately thereafter, Hess, the plaintiff in error, filed an affidavit, stating that the wife of his co-defendant, Hoyt, was a material witness for him; and that he believed he could not have a fair trial without her evidence, and if tried jointly without the said Hoyt. Whereupon came the said Hess, as well as the prosecuting attorney, and the jury being called, were sworn, to try the issue joined, and they found "the defendant, Benjamin Hess, guilty of the first, third, and fifth counts in the indictment charged against him, and not guilty of the residue of the counts in said indictment charged." There is no formal order of the court, during the trial of Hess and Hoyt; but does not the record attain to such certainty, as to advise any one that he was not only tried alone, and so tried at his own request, but that the jury were sworn to try him alone, and passed upon him alone, according to their oath. It is urged that their offense is in its nature several, and that two can not be jointly indicted and convicted. We do not see the force of this objection. Could not several persons have a joint possession of bank notes as well as a joint property? Can not persons jointly possessing property jointly sell it? When two go into a shop to steal, a third, who stays on the outside to watch, and co-operate, is a principal. 1 H. P. C. 462. So, if A. and B. be present, consenting to a robbery or burglary, though A. only actually does the act, while B. watches in another place, both are robbers and burglars. 1 H. P. C. 537; 1 Foster, 350. And in general, if several unite in one common design, to do some unlawful act, and each takes the part assigned to him, though all are not actually present, yet all are present in the eye of the law. Foster, 450, 353; 1 Hale P. C. 439; 2 Stark. Ev. 7. If these cases are law, and it will hardly be disputed that they are, there will be but little difficulty in determining the question of joint and several possession and disposition of their counterfeit notes, and the joint or several guilt of those concerned.

*6. I will now consider the objections urged to the suffi- [12 ciency of the indictment. The first has been considered in the

last proposition examined, and we do not feel the necessity of adding anything on that point. The second is, that the sale of these notes is not alleged to have been made to the injury of any one; and is, therefore, not within the statute. 3. That it is not charged that the sale was for any consideration paid by the purchaser, and so no sale in point of law could exist. 4. The notes set forth are payable to order, and are not alleged to have been indorsed, and so are not currency. 5. That the offense is charged to be feloniously committed, when the act of assembly makes no such definition. Was it necessary to charge the sale of these notes to have been to the injury of any person? The forging of any record, note, contract, etc., with intent to damage or defraud any person or persons, body politic or corporate, and the uttering such instruments with the like intent, are punished as offenses by our statute. 20 Ohio L. 139, 140. The counterfeiting coin currently passing in the state, and uttering such coin, knowing them to be such, and the making any instrument for counterfeiting such coin, are distinct offenses. 29 Ohio L. 141. The sale, barter, or disposition of counterfeit bank notes, or the being detected with such notes in possession, for the purpose of selling, etc., are distinct offenses. Forgery, at the common law, was considered only a species of fraud, and might be committed of any writing by which another might be defrauded. Yet the distinction was marked out between forgery and fraud; and forgery was held complete, though no one was actually injured, if the tendency and intent to defraud were manifest. 3 Ch. C. L. 1022. The fraudulent intent appears of the essence of this offense, and is particularly expressed in the statute of 5 Eliz., c. 14, and in most if not all the other acts. 2 East C. L. 854. Hence, the indictment for forgery charges the intent as part of the offense, and that must be proven. The offense charged in this indictment is of a different character. The legislature, it has been shown, has retained the intent to defraud as part of the definition of forgery, while it has rejected that intent as an ingredient in either of the offenses described in the indict-
13] ment under consideration. It was *within the power of the legislature to define the offense. It is the general rule, applicable to all statutory offenses, that an indictment must set forth the charge in the words of the statute describing the offense. 2 East C. L. 985; 1 Hawk. 26, ch. 70; 2 Hawk. 110, ch. 25; 3 Inst. 13. The same question has been decided in this court. 4 Ohio, 387.

It would seem, then, that as the law has not made it necessary to these criminal acts that they should be done with intent to injure, an allegation of such intent is unnecessary. The same remark applies to the want of an allegation that the sale was for a consideration paid.

The next objection urged is, that the notes set forth are made payable to order, and are not alleged to have been indorsed, and so were not currency. I have before shown that, upon the authorities, the indorsement is not considered in law any part of the note. 1 Mass. 62, 203; 2 Mass. 373, 379. It is of no consequence, even in forgery, whether the counterfeited instruments be such as if real would be effectual to the purpose it intends, so long as there is sufficient resemblance to impose on persons of ordinary observation, though persons of experience could not be deceived by it. 3 Ch. C. L. 1035; 2 Stark. Ev. 579. The next objection is, that these notes are charged in the indictment to have been feloniously made, when the statute makes the offense a misdemeanor. The statute does in terms declare the person offending shall be guilty of a misdemeanor. The attorney, in drawing this indictment, has introduced this word from the English forms. It seems to us to have no application in describing the offense set forth in the indictment, and that it may be rejected as mere surplusage, its presence doing neither good nor harm. If feloniously supposed in the accused greater moral turpitude than is necessary to constitute a misdemeanor, this jury have found it in this case, and the greater must include the lesser guilt.

I have, I believe, waded through all the objections taken for the plaintiff in error. In this no aid has been given by counsel on either side; neither abstract nor brief of argument has been given us. While courts should take care that persons accused of crimes are secured in all their legal *rights, it is due to the com- [14 munity to see that those substantially charged with crimes, and found guilty, shall not escape punishment by reliance upon technicalities and forms, multiplying the chances of escape, and holding out the prospect of impunity to guilt as an inducement to venture the commission of crime. We see no error in the proceedings of the court in the case before us.

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STATE OF OHIO v. JAMES W. GAZLAY.

A tax assessed upon the members of a profession upon account of their practice is constitutional, being not a poll but a faculty tax, and may be legally assessed by the judicial tribunals.

THIS was an action of debt on the act of assembly assessing a tax upon lawyers.

The cause was tried by jury at the May term of Hamilton county, on a written agreement as to evidence and the questions to be made under it. It was admitted that the court assessed a tax of five dollars on each member of the profession and on the defendant, as stated in the declaration, defendant to make any and every constitutional objection to the action. It was admitted that defendant was duly licensed to practice law in this state in the year 1813.

The jury, under the direction of the court, found a verdict for the state, the consideration of the legal and constitutional questions being reserved for the court in bank, which questions were:

1. That the general assembly can not authorize the court of common pleas to lay or assess the tax.

2. The law impairs the validity of a contract within the terms of article 8, section 16, constitution.

3. The tax is not a property, but a personal or poll tax, and as such violates section 23, same article.

4. The law is in opposition to the spirit and nature of our government and institutions.

Mr. GAZLAY argued in support of these propositions:

15] *A preliminary proposition may be raised involving the power and duty of the court on questions of constitutional law. To debate this proposition is, it would seem, to dispute a leading article of our political faith, viz: That a frequent recurrence to its fundamental principles is necessary to the existence of free government. How are we to recur effectually to these principles without the aid of the judiciary? Take from courts this power, relieve them from the obligation of it, and the constitution becomes a dead language without an interpreter. The life of the instrument depends on the judicial exposition of it. Principles

are so intimately allied to language, so connected with it, that doubt as to the import of the latter will sometimes endanger the former; our own history is full of illustration as to this fact; we can defend and preserve our political rights only in proportion as we understand them. The judicial proceedings of the day on this subject are pretty conclusive evidence of the public opinion as to the best manner of obtaining information in relation to it.

1. It is the constitution, and not the general assembly, which creates and defines the power of the judicial functionary—these powers and the duties they include are purely and exclusively of a judicial character. It is not seen that the general assembly has more authority to change them than is possessed by the judicial to change those of the general assembly. Both are equally created by the constitution, and both equally dependent on it. If safety alone were to be our counselor, there are few of us who would not prefer the latter to the former change. What is the proposition? The constitution says that the court shall have and exercise certain judicial powers, and in thus declaring excludes all others. The general assembly, which is also the creation of the same constitution, says that they shall have and exercise other powers; that they shall lay and assess a tax upon lawyers. Who for one moment can maintain such a proposition?

Admitting that the general assembly can not enlarge the powers given by the constitution, it was contended below that the court could volunteer the service performed in this *instance, and [16 that in such a case the constitutional question need not be raised.

I apprehend that such a statement of the case serves rather to increase than diminish its difficulties; the question is not one of motive, but of power. The act when performed is authorized, or it is not; whether done under restraint or voluntarily can not, therefore, affect the right to perform it. Again, if the court can volunteer this service, they could do so as well without as with the law of the general assembly; if they can perform this service without law, they can equally perform any other service without law. Are the general assembly prepared to sanction such a power? The proposition that a court may, as volunteers, exercise high powers not given them by the constitution, may claim the merit of novelty, but nothing more. Again, to assess and lay taxes is a highly responsible and important duty; a duty which belongs to an appropriate office, the incumbent of which must be elected and

sworn into office; will it be pretended that a court can, under any view of the subject, take upon itself such an office?

2. As to impairing the validity of a contract.

The effect to be given to section 16 of article 8 of the constitution does not depend upon the argument of the present case, but on decisions of high and respectable tribunals of justice. The cases of Dartmouth College *v.* Woodward, 4 Wheat.; Green *v.* Biddle, 8 Wheat. 84; and New Jersey *v.* Wilson, 7 Cranch, are relied on as authority. In these cases, the court are understood as saying, that the prohibition of the constitution, in relation to the impairing of contracts, extends to those made between a state and an individual, equally as much as those made between individuals, and that legislative gifts, grants, and privileges are to be considered as contracts within the constitutional designation; and that a law, which alters, lessens, or in any degree restrains or changes the rights secured by such gift or grant, or by any contract, infracts or violates the constitution. If this be constitutional law, it remains only to be considered whether the act of the general assembly produces any interference or impediment to the practice of the defendant secured by the license of 1813.

17] *The license confers the right to practice, or is rather the evidence that the holder has complied with the conditions of the law under which the license is granted, which law secures him the right on the conditions evidenced by the license, and without which he could not practice his profession. The law of 1825, under which this action is brought, professes to regulate this same practice, and in express terms includes all who are in practice at the time it takes effect, as it does those who should thereafter be admitted to practice, and requires the court to assess a sum of money on both classes, provided the person to be assessed or taxed has been at the time two years in practice, and provides also for legal compulsion, if the sum assessed on each be not paid. The assessment was made upon the defendant while he was in practice under his license, and the present suit is brought to enforce payment of the sum so assessed. The defendant has, therefore, no right to practice which was not secured to him by his license and the law under which it was granted. The law under which the present suit is brought, if it affects anything, affects the rights of the defendant existing at the time of its passage and going into operation. This law requires something of the defendant; for

this something the present suit is brought. Is this something in addition to what was required of the defendant by the former law? Does it, or can it bear upon, or interfere with his right of practice under that former law? This, it would seem, is the question, and the only one now to be settled.

The tax is assessed; it is demanded, and suit is brought to enforce its payment. For what, but for and on the right of practice, which the defendant legally enjoyed at the time the assessment was made? This right of practice is a personal one as much as any right to which a citizen has claim. Can it be for one moment contended that suit, prosecution, execution, and imprisonment do not interfere with the right of practice; nay, that they are not the most unequivocal interference, amounting to total prohibition of the right and power to practice, if the taxed be unable or unwilling to pay; if so, no other question need be made on this branch of the case.

It is laid down as a mathematical truth (and why not *also [18 a legal one?) that things which are equal to one and the same thing are equal to each other. A law, therefore, passed by the general assembly, expressly imposing fine and imprisonment on all persons found in the practice of a particular licensed profession, would be precisely equal in effect to a tax law, which resulted in the same fine and imprisonment to such profession. If the general assembly could enforce the former, they could the latter.

The laws regulating taverns, ferries, and auctions were referred to in the argument below, as giving the general assembly a sort of common law or proscriptive right over all professions, and as being in point as to the power to tax licenses. If such a reference deserves a grave reply, it must be sought for.

Certain offices are set to sale by public authority, and that with a view to revenue; they are open to every purchaser who will pay the price demanded. The *quid* precedes the *pro quo*—payment secures the right or license either for a single year, more or less. Can public authority demand additional payments before such license or right expires? Certainly not, and why? Because it would impair the effect and validity of a contract. The state are entirely welcome to the full weight of this reference.

3. That the tax is personal and a poll tax.

The power to tax is an incident of sovereignty, without which

the operations of government can not be sustained; but it is a sustaining power only when exercised within given limits; beyond these it becomes a destroyer. It was the opinion of our ancestors that this power could be safely lodged with those only who were compelled to use it, if at all, against themselves. This opinion combines taxation and representation as inseparable, and forms unquestionably the strong bulwark of free government.

But even this principle, as unexceptionable as it appears of itself, does not afford sufficient security to all classes; a principle inherent to political justice, denominated equality, demands that those institutions, which are designed alike for the protection and security of all, should be maintained by the equal contributions of all; this equal contribution is sustained on the basis of prop-
19] erty alone; it looks, therefore, *to property as its sole element. The idea of personal service as a return or compensation for being well governed, is perfectly feudal, and has long since been exploded; a tax, therefore, which does not proceed upon the basis of property, but that of person, is, to its extent, a restoration of feudal principles. The framers of our constitution, feeling the force of these principles, provided against the imposition of any other than a property tax by denouncing a *poll tax* as grievous and not to be imposed. We are too familiar with the usages of our government not to know that they frequently explain the terms by which they are created. "*The polls*" designate a place which, either for political importance or effect, gives room to no other; these words convey a numerical and personal idea, excluding entirely that of property. *To poll* signifies barely to number or count the heads of such or such a mass of citizens; there can, therefore, be no misapprehension as to the terms *poll tax*, which is not to be imposed for state or county purposes, leaving it clearly with the pure democracy, assembled in town meeting, to adopt the feudal policy in aid of their smaller matters, if they choose so to do.

A land tax is not a poll tax; and why? but for the reason that it is imposed in relation to land or property, and takes no account of the person, unless it be to afford to such person an opportunity to raise the lien created against his land; if he do not do this, his poll or person is not considered of the least account.

The same may be said of personal property—the government takes no account of the head or poll of him who happens to be as-

sociated, under the term "owner," with any given quantity of dead matter; they seize the substance, but let the head escape.

The rapacity of the church has at different periods, racked human invention to find subjects and occasion for exactions and extortion; but scarcely an instance can be found where it has placed any high estimate upon the poll, and none where it has been taken in satisfaction of a single tythe; and although our sturdy ancestors were sore pressed under the Henrys and Edwards, both in land and silver, for various oppressive contributions, the poll on person was never demanded or taken in satisfaction.

*There can not be found a respectable treatise on political [20 economy, in which any and every tax, not holding property as its basis, is not condemned as unjust and oppressive. Can our own constitution tolerate what is odious and oppressive, even under the administration of monarchical government?

Will it be contended that this is an income or faculty tax? The first is a property tax in every sense of the word, the latter is a poll tax. If this were a tax on income, it must have been proportioned to such income, which it is not. Did the general assembly so intend it to be? If they did, the tax is imposed even without the forms of legal provision, inasmuch as it exacts an equal sum from each of those on whom it is assessed. Again, it can not be an income tax, because no provisions are made, no power given for an assessment on the amount of income, or even for ascertaining the amount. The maximum of fifty dollars is a bare limit to the discretion of the court, in the same words, and precisely for the same effect that they are inserted in criminal statutes.

4. This tax is imposed either in commendation or derogation of the profession; if for either, it equally violates the spirit of our institutions. The law imposing it would be rendered no more personal and invidious, had it contained the names of the persons in the professions against whom it is directed. Who are they who fill the ranks of the legal profession? Monopolists, speculators upon the rights of others? Far from it; they are the opposing shield between oppression and its victims; they come forth to defend and protect those social rights, and to enforce those social duties which have so clearly distinguished and elevated the present above the barbarous ages; coming chiefly from the middle ranks of life, they venture upon an employment at once the most arduous and honorable, one in which distinction is the meed barely of severe toil

and research; an employment which demands sacrifices of both mind and body; one which is not learned in the bowers of pleasure or the courts of ease; but which takes its assiduous lessons, not from record and volume alone, but from the intricate and endless passages of the human heart. Distinction, even then, is more than precarious, unless to all be superadded a gift which no lesson can 21] impart—a noble, generous, and fearless nature. Be the *final destiny of this employment whatever it may, its followers can not be reproached; if they have appeared to defend crime, it was because they wished to defend the laws and the weakness of human nature; if they have appeared to advocate injustice, it is because humanity has no perfect code; in the field of honor, at their country's call; at the bar, even beneath a tyrant's frown, the cause of innocence and patriotism will award to them the meed of equal and untiring firmness. If there be blots upon their history as a class, it may be answered that the sun himself has his obscuring spots, and that nature exhibits the beauty and grandeur of the unrivaled bow on the bosom alone of a dark cloud.

I have sought, and sought in vain, for some redeeming cause or authority for the imposition of this tax; none can be found; the authorities are against it; good sense is against it; justice and equality, our political boast, are against it—the spirit, therefore, of our institutions is against it; why, but from a conviction of all this, has it been repealed? In resisting it, I have discharged no more than a common duty; to pay it, I should become a party to its injustice; this I can not do, and remain a worthy descendant of those who resisted the tea and stamp tax.

Opinion of the court, by Judge LANE:

It is evident that the expenses of government should be borne by individuals in proportion to their respective abilities, or in other words, in proportion to the revenue which they enjoy under the protection of the state. In some countries, however, either from ignorance, from a want of financial skill, or from a disregard to any considerations, except the faculty of levying revenue, taxes have been imposed numerically upon citizens, without any reference to their capacity of sustaining the burden. These are poll or capitation taxes; and the convention deemed their operation so inequitable that they have forbidden the legislature to adopt them for state or county purposes.

1. Does the tax imposed upon those who exercise the professions of law and medicine possess the character of a *capitation [22 tax? This question has been heretofore presented to this court. 2 Ohio, 63. But as no argument was presented, this court are invited to review the opinion they then expressed, that it does not possess that character. This court, after reconsideration, see no reason to change their conclusion. The tax is not levied upon the person without relation to his abilities to pay, but it is designed to operate upon the profits of lucrative professions, and the amount of the tax is fixed with reference to the amount of the profits.

2. It is said a license to practice is a contract, and that a tax upon such as are licensed, is a violation of the contract. We can not consider the license in this light. Although the effect of the license gives to the members of these professions something of an exclusive character, and incidentally confers valuable privileges, yet the design of the license is to protect the community from the consequences of a want of professional qualifications, and to benefit the public by enabling the profession to acquire professional merits; consequently the license can not be holden to confer any vested privileges, but is liable to be modified in any manner which the public welfare may demand.

3. The manner of assessing the tax does not, in our opinion, render it illegal. If the common pleas had declined the assessment as a service beyond their judicial duties, as the judges of the judicial courts declined acting under the act conferring pensions, it would be a grave question whether the duty could have been executed. But the judges have assessed the tax, and a privilege which they do not claim, can not avail the defendant.

It is said that the law is inconsistent with the nature of our government and constitution. The court can not very well understand the precise nature of the objection, but believe it is more properly addressed to the other departments of government. If the expediency of the law were properly before us, we should know no reason why the profits which arise in the exercise of lucrative professions, are not only legitimate objects of taxation, but objects peculiarly proper to sustain a due share of the expenses of government.

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23] *TRUSTEES OF CIN. TP., HAMILTON CO. v. AARON OGDEN.

Overseers of the poor of the proper township are bound to support a casual pauper, if found within the limits of township, and requiring support.

Where, after notice, the overseers of the poor refuse to provide for a pauper, an individual furnishing a necessary supply, may recover the amount in an action against the township.

THIS cause came before the court on a writ of error to the court of common pleas of Hamilton county. The case was this, as presented in a bill of exceptions:

The declaration was in assumpsit, and counted for "meat, drink, washing, and lodging; and other necessaries, found and provided by the plaintiff, at the special instance and request of the defendants, for one Martha Good, then and there being an inhabitant of Cincinnati township, and then and there being in a necessitous and suffering condition." Plea, *non assumpsit.*

The proof, on the trial, disclosed that about December 8, 1829, Ogden hired Martha Good to perform domestic labor in his family; that about the 15th of December, she was taken sick with the small-pox, of which she was confined to her bed, in Ogden's house, about two weeks, when she died. During this period she was provided for and nursed by Ogden's family, who, after death, provided her burial clothes; that she was apparently destitute of property, except some clothing; that she came from some other county of the state than Hamilton, and had no legal settlement in Cincinnati township; that when taken sick, Ogden applied to the trustees to take charge of her, who visited her and refused, but contributed one dollar as a gratuity, and proposed some other gratuitous aid, which Ogden refused to accept, unless upon an agreement to provide for her altogether; that there was no county poor-house in Hamilton county, and that Ogden was a man in narrow circumstances. Upon this proof the court of common pleas charged the jury that the plaintiff was entitled to recover, and a verdict was given for thirty dollars. The suit having been appealed from the judgment of the mayor, for fifteen dollars, by the trustees, judgment was rendered by the common pleas for the amount of the verdict and costs, to reverse which, this writ of error was brought.

*N. WRIGHT, for the plaintiff in error, contended: [24

1. That no action could be sustained against a township for necessaries voluntarily furnished by an individual, to a person not having a legal settlement in the township. 2. That no action could be maintained for necessaries thus voluntarily furnished, provided the pauper had a legal settlement in the township.

He insisted that a discretion was vested in the trustees to examine and decide upon the case of any individual who might be supposed to want assistance, and to grant or refuse an order to the overseers of the poor, as each particular case might seem to require. That having exercised this discretion no action would lie against the township.

That the obligation of a township to support its paupers is, in the nature of a moral, not an absolute legal obligation. He cited a great number of cases from the Mass. and N. Y. reports, not as authority, but as showing the course of proceedings in those states, and the construction put by their courts upon their own peculiar statutes.

STORER & FOX, for the defendant in error, contended:

That an obligation vested in each township to support all paupers within its limits. That this support is not confined to those who have obtained legal settlements, but must be extended to casual paupers; that this is an absolute obligation, and if support is refused, any individual who shall, after having given notice to the overseers, furnish a suffering pauper with necessaries, may maintain an action against the township.

Opinion of the court, by JUDGE HITCHCOCK:

The court are called upon in this case to give a construction to the "Act for the relief of the poor," passed February 10, 1816 (14 O. L. 197), and the act amendatory thereto, passed February 12, 1829 (27 O. L. 50).

We can not expect to derive much assistance in the performance of this duty from the examination of English or *American [25 cases. The whole subject of supporting the poor, where it is done in pursuance of municipal law, depends upon statute regulation, and these statutes have been variant in different countries. It is owing to this variance that different decisions, upon the same question, are made in different states.

In this state, it has ever been the policy that each incorporated township should support all paupers within their respective limits.

This does not seem to be controverted by the counsel for the plaintiff in error so far as it respects those who have obtained legal settlement; but it is denied that any duty is imposed to maintain those who are merely casual residents. The statutes in force at the time the liability of the plaintiff in error occurred, if there is any liability, are those of February 10, 1816, and February 29, 1829, and it is by these statutes the case must be governed. Section 1 of the act of 1816, enacts "that the overseers of the poor shall have the care and management of *all* paupers within the limits of their respective townships." Here is no restriction, no limitation. "All paupers," within the limits of the township, are to be under the care and management of the overseers of the poor. It may be proper here to remark, that the trustees of Cincinnati township are, by statute, authorized and required to discharge the duties of overseers of the poor.

Section 2 of the same statute enacts "that upon complaint being made to the overseers of the poor, that any inhabitant or inhabitants are in a suffering condition," etc. Every person residing in a township is an inhabitant, although such person may not have gained a legal settlement.

It would seem to the court, that a fair construction of these two sections of the statute would lead to the conclusion that the obligation was imposed upon the township to maintain or support, not only such paupers as have gained a legal settlement therein, but also such as were casual residents and who might need assistance. But, if there could be any doubt upon these two sections, that doubt must be removed upon the examination of the fifth.

This section provides, "that where any person or persons 26] *shall become chargeable in any township in which he, she, or they have not gained a legal settlement, it shall be the duty of the overseers of the poor of such township, to cause such person or persons, so soon as the state of his, her, or their health will permit, to be removed to the township where he, she, or they were legally settled," provided such person or persons have any legal settlement in this state; and if they have no legal settlement in this state, then the overseers of the poor are authorized, under the direction of the trustees of the township, to remove them to the state where they have a legal settlement, unless security is given to indemnify the township. By the same section, an action of debt is given against the township to which such pauper is re-

moved, in favor of the one from which the removal takes place, to recover not only the expenses of removal, but such other expenses as may have been necessarily incurred. A person can not properly be said to "become chargeable," unless there is an obligation resting to incur charges.

It is urged, however, that the statute of 1829 is to be taken in connection with that of 1816; and that, under this statute, the legislative intention is manifest, that support shall be extended to casual paupers only in those counties where there is a county poor house. We come to a different conclusion upon an examination of this statute. The legislature, it is true, in section 3, provide that where there is such poor-house, paupers of this description shall be taken to it and there taken care of. It would be a strange inference to draw, that because this provision was made, such pauper should be left in those counties where there was no poor-house, to subsist upon the cold hand of charity or to suffer and perish.

The next question to be examined is, whether an individual who has furnished necessaries to a pauper can maintain an action against the township. The solution of this question must depend upon the nature of the obligation which rests upon a township to support its poor. If it be merely in the nature of a moral obligation, then no action can be maintained unless there has been a previous request or an express promise on the part of the township. But if, on the other hand, it be an absolute legal obligation, then the law *implies a promise and an action can be sus- [27 tained. We are of the opinion that it is of this latter description. The supreme power of the state, by legislative enactment, has imposed the obligation. It is of as much binding force as the obligation of a parent to support his child or a husband his wife. We do not say that in every case, where an individual furnishes necessaries to a pauper, he can maintain an action against the township. Complaint must, in the first instance, be made to the overseers of the poor. If these neglect their duty, or if the trustees of the township refuse to make the necessary order, it is right and proper for an individual to furnish a distressed pauper with the necessary relief, and justice, sound policy, and law require that the individual performing this benevolent act should be remunerated.

On the part of the plaintiffs in error, it is urged that it is discretionary with the trustees to make or refuse an order for the support of a pauper; and that if these officers, in the exercise of that

discretion, refuse, the township can not be subjected to an action, although by possibility the officers, in their individual capacity, might be liable for nonfeasance or misfeasance. It is true that a discretion is vested in the trustees, but it must be exercised in such a manner as to carry into effect the object of the law. They are the agents of the township. The township, not the individual trustees, is the responsible body, and the township can not excuse itself by saying that its agents have been guilty of official misconduct.

It is further intimated that these officers should be proceeded against by *mandamus;* and such, in certain cases, seems to be the mode of proceeding in New York. But if the object was to compel the trustees to make the necessary order, this would be but a poor remedy, especially where the pauper was suffering under the ravages of a dangerous and loathsome disease. Before it could be applied the township would, in all probability, be relieved from expense by the death of the miserable being.

In the case before the court, it appears that Martha Good, the individual relieved, was residing in Cincinnati. She was taken sick in the house of Ogden with the small-pox. She was clearly a 28] pauper, and needed assistance. Ogden complained *to the trustees, and demanded of them to take the charge of her. This they refused. He was compelled either to let her suffer or perish in his own house, or to furnish the necessary aid. He pursued the latter course, and we can not doubt his right to receive a compensation. The charge of the court of common pleas was to this effect, and is in accordance with our opinion of the law. The judgment of that court must be affirmed.

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LESSEE OF W. MCMILLAN ET AL. *v.* S. Z. ROBBINS.

Tenant for life, without impeachment for waste, suffers the land to be sold for taxes, he forfeits the estate for life, and the reversioner may recover in ejectment.

The reversioner has the right to redeem, where the land is sold, and the tenant, by depositing the amount of tax and interest, can not save the forfeiture.

The law forfeiting tenant's estate for non-payment of taxes is constitutional.

THIS was an action of ejectment, submitted to the court upon an agreed statement of facts, in the county of Hamilton.

The following is the state of facts:

Wm. McMillan devised the lands in controversy to his wife, for life, without impeachment for waste—reversion to the lessors of the plaintiff. The wife, tenant for life, is still alive.

On February 29, 1825, the tenant for life made a lease to S. Z. Robbins for the same premises, during her life, upon certain trusts for minor children and for herself, and gave him possession under the lease.

Neither the tenant for life nor her lessee ever caused the lands to be listed for taxation in the name of one or the other, but they stood listed to the heirs of McMillan.

The taxes for 1827 and 1828 were not paid, and the land in question was regularly sold for these taxes on the last Monday of December, 1828, to William Corry, one of the lessors of the plaintiff.

On April 28, 1829, J. C. and S. Z. Robbins deposited with the county auditor money to redeem the land from the sale for taxes.

*HAMMOND, for the plaintiff: [29

This suit is brought by the reversioners, who claim to recover on the ground that under the statute, by failing to list the land for taxation, and by failing to pay the tax, and suffering the land to be sold therefor, the life estate is forfeited. 22 Ohio, 252, sec. 14.

STORER & FOX, for defendant:

This land was properly listed in the name of McMillan's heirs. It was not the intention of the legislature that the several descriptions of persons named in section 14 of the act of February 25, 1824 (22 O. L. 251), should list the lands in their own names, but in the names of those in whom the fee is vested.

It was the duty of the lister or assessor to call upon the tenant in possession, if resident in the county, and demand a list. Until this is done there can be no forfeiture. That it was done in this case there is no proof. 23 O. L. 64, 65.

The land is not forfeited for the non-payment of the tax, because no time is fixed by the statute within which the tax shall be paid or the forfeiture accrue. If, therefore, the tenant for life suffer

the land to be sold for the taxes, and afterward redeem it, there is no forfeiture.

GAZLAY, on the same side:

Robbins is a mere trustee for the original tenant for life, as well as for certain minor heirs. He has not such an estate as is named in section 14 of the act of 1824, as being subject to forfeiture for failing to list or to pay the tax. The only penalty which could attach to him would be the payment of damages for neglect of duty.

This section 14 is highly penal, and should be construed strictly.

Forfeitures are odious, and it is at least doubtful whether the legislature have the right, under the constitution, to create a forfeiture in a case like the present.

30] *Opinion of the court, by Judge HITCHCOCK:

In the act of February 25, 1824, "declaring what lands in the State of Ohio are subject to the payment of tax," it was the intention of the legislature so to frame the law that all lands which could, consistent with public policy, be charged with a tax, should be brought into the list; and they intended to make it the interest of each individual, not only honestly and correctly to list his land, but also promptly and punctually to pay the tax. If, in any instance, heavy penalties were imposed, if forfeitures were threatened, it was with a view to effect these objects. Such penalties and such forfeitures could do no injury to the honest citizen, who is always willing to contribute his proportion toward defraying the necessary expenses of that government which protects him in his life, reputation, liberty, and property, although they might bear heavy upon those (and there are some such in every community), who feel it a grievous burden to contribute a mite to promote the public welfare. Such being the object of the law, we can not see why the court should be called upon to construe away, or, if called upon, why it should construe away any of its provisions, to relieve those, if any there be, who, by refusing to comply with its requisitions, have incurred its penalties.

I am aware that it is common to complain of tax laws, and there is, perhaps, no part of legislation which it is more difficult to perform satisfactorily, or in such a manner as to do exact justice to

all, than to frame a revenue system. We are aware, too, that courts have been astute to find defects in tax sales, so much so that in this state, at least, it has become the general, if not universal opinion, that a title derived under such a sale can not be supported. Whether courts have done wrong in this is not for us to say. The consequences, however, as members of the community, we can not but regret. That it has a direct tendency to encourage those who dislike to pay a tax in the neglect of the performance of this duty there can be no doubt.

In section 14 of the act of 1824, it is enacted "that every person shall be liable to pay tax for the lands of which he or she shall stand seized, or may have in charge, either *as guardian, [31 or executor, or by courtesy, or in dower for life, or in right of his wife, or as agent or attorney, having funds of his principal in his hands," etc. The section thus makes it the duty of these several persons to list the lands for taxation, "and pay the tax which shall yearly, and every year be assessed thereon."

It then goes on to provide that every person so seized, as guardian, and "neglecting or refusing to list, or pay the tax on the land of which he or she is so seized," shall be liable to an action on the case, to his or her ward, for any damages which the ward may have sustained in consequence of such neglect; in like manner, any person seized as executor shall be liable to the devisee or devisees, who may have been injured by such neglect or refusal; "and every person so being seized, or having care of lands as aforesaid, either by courtesy, or in dower, or for life, or in right of his wife, and neglecting or refusing either to list or pay the tax on the lands of which he or she is so seized, or has the care of as aforesaid, shall forfeit to the person or persons next entitled to the said lands, either in remainder or reversion, all the estate which he or she, so neglecting or refusing may have in the said lands, and shall moreover be liable to an action," etc. The same section also gives an action in favor of the principal against his agent or attorney, where the attorney as agent, shall neglect or refuse to list or pay the tax on land, "such attorney or agent having funds of his principal in his hands."

The provisions of this section appear to be very clear and explicit. It is made the duty of persons having the care and management of land, to list the same, and pay the tax, whether they have any interest in the land or not; and if they fail to do

so, it makes them liable to an action in favor of any person who may suffer in consequence of their neglect. It is also made the duty of those who may be seized for life of any lands to list the same and pay the tax, and upon their failure so to do, it declares that their estate shall be forfeited; in other words, that it shall terminate; and the person having the remainder or reversion, may enter. Where is the great hardship, the injustice of this provision? The tenant for life is seized of the lands, he is entitled to 32] the profits, *and certainly justice would dictate that he should pay the tax. If he does not, and the land is sold, what is the consequence? Not only his estate is gone, but also the estate in remainder or reversion. For it must be remembered that, by our laws, the state has a lien upon all lands for the taxes, and when those lands are sold by the proper officer, it is not the interest of the individual in whose name they are listed which is alone transferred, but it is the land itself, an absolute estate in fee simple.

This section 14 of the act of 1824, if we are to give it that construction which comports manifestly with the intention of the legislature, would seem to be decisive of the case before us. The widow of McMillan had an estate for life in the premises—this estate she assigned to Robbins; Robbins neglected or refused not only to list, but also to pay the tax. The law is explicit, that under such circumstances the tenant for life shall forfeit his estate to the person or persons next entitled to the lands, either in remainder or reversion. It is admitted that the reversionary interest in these lands was in the lessors of the plaintiff.

It is argued, however, on the part of the defendant, that Robbins being seized in trust for minors, has not such a seizin that the law attaches a forfeiture to any act done by him. This argument is founded upon the assumption that a tenant for life, liable to pay the tax, and to forfeit the title for failure, can create an estate liable neither to pay the tax nor to forfeit. This assumption is one which can not be sustained by the court.

Robbins had an estate neither greater nor less than his assignor or lessor, and was entitled to the same privileges, and subject to the same burdens and disabilities.

It is further argued, that this land was properly listed in the name of McMillan's heirs, and that the estate is not forfeited for the failure of the tenant to list, inasmuch as there is no proof to

show that the assessor or lister called upon the defendant and demanded a list. Whether this objection is well taken, we deem it unnecessary to determine, inasmuch as a forfeiture is incurred, as well in consequence of the non-payment of the tax, as for a failure to list, and the case *shows that the tax was not [33 paid by the tenant for life, but that the land itself was sold for the tax.

The counsel for the defendant insist, however, that there can be no forfeiture, on account of the non-payment of the tax, because they say the legislature have not said expressly within what time it shall be paid, or the penalty incurred. By the general law on the subject, taxes are made payable to the county treasurer on or before the first day of December of each year; and if not then paid, a penalty of ten per cent. is incurred. The tax, together with this penalty, may be paid at any time during the month of December, and if not then paid, the land on which the tax is charged, is returned delinquent; and if a second time delinquent, is sold for the tax. It would be absurd to say, under such circumstances, that no time is fixed within which the tax is to be paid. To us, it would seem difficult to make use of language to fix it more definitely than has been done.

It is claimed that the defendant has a right to redeem, and that having deposited the money for this purpose with the proper officer, no forfeiture is incurred.

No person has a right to redeem lands sold for taxes unless he has some interest. The interest of the tenant for life is forfeited, not by the sales of the lands, but by his neglect or refusal to pay the tax. The fact that the land has been sold, is evidence of the failure to pay. And when this failure is established, the interest of the tenant is ended. This case is not between the purchaser of the tax-title and the previous owner of the land, but between the reversioner and the tenant for life. The heirs of McMillan having the reversionary interest, would have the right of redemption; but Robbins has not, because his interest in the land is entirely gone.

Another ground of defense is, that the law under which the plaintiff seeks to recover is unconstitutional. If this be true—if it is clearly against any provision of the constitution—this court will not enforce it. We have not been referred to that part of the constitution which is violated. Perhaps it is section 16 of

article 8. This section provides that "no *ex post facto* law, nor any law impairing the vailidity of contracts, shall ever be 34] made; and no conviction *shall work corruption of blood, or forfeiture of estate." The section of the law now under consideration is not *ex post facto*. It has no retrospective operation; it is entirely prospective in its requisitions and effects. Neither does it interfere with the validity of a contract.

But it is said to work a forfeiture of estate. There is no difficulty in ascertaining the intention of the convention, in introducing this clause into the constitution, and it is impossible to believe that a case in any shape similar to the one now before the court, was in view. We know that in England, the conviction of many offenses, works "corruption of blood and forfeiture of estate." And this operates in many, if not in all cases, from the time of the commission of the offense. The forfeiture is to the king. The blood is also corrupted. The attainted person can not inherit lands from his ancestor, neither can he transmit an inheritance to his heirs. In truth, the punishment of the offense is not confined to the individual offender, but is extended to his wife, his children, and his heirs, by depriving them of his estate, and thereby, in some instances, of the means of subsistence. It was against a state of things like this, that the convention intended to provide, and they have, therefore, put it beyond the power of the legislature to enact "that any conviction shall work a corruption of blood or forfeiture of estate."

What is the case before the court? The law of the state has provided, that, with some few exceptions, all lands shall be subjected to taxation; if the taxes are not paid, the lands shall be sold, and the rightful owner divested of the title, and the same be transferred to the purchaser. So far there is no complaint. This is all right and just. It is well, because so far the law has said nothing about forfeiture. But what is the effect? The owner of the land loses his title as completely as if the same had been in express terms declared to be forfeited.

The same law has made it the duty of a tenant for life to pay the tax upon the land of which he is thus seized. This is admitted on all hands to be just and proper. Receiving the rents and profits of the land, it is right he should pay all taxes with which it may be burdened. But if it does not pay the tax, the law de-35] clares that his estate shall be forfeited *in favor of the re-

mainder-man or reversioner. It is not the thing done, but the word used, which makes the difficulty. If the legislature, instead of saying the tenant for life "shall forfeit" his estate, had said, "such estate shall cease and determine," I apprehend no one would have suspected an interference with the constitution. This is the effect and the only effect produced, and I deem it an immaterial matter what words are used. To my mind it is clear that there is nothing in this section 14 of the act of 1824 interfering with the provisions of the constitution.

Upon the whole, a majority of the court are of opinion that, the law arising upon the agreed state of facts is with the plaintiff, and judgment must be entered accordingly.

Judge COLLET dissented.

REMEMBRANCE WILLIAMS *v.* SILAS ROBERTS AND OTHERS.

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The vendor of land, who makes a conveyance and takes notes with personal security for the purchase money, does not retain a lien on the land for that purchase money.

THIS was a suit in chancery, reserved from the county of Greene.

The bill sets forth, in substance, that Williams, in September, 1817, sold and conveyed, by deed of bargain and sale, to one David Connelly, two hundred and sixty-nine acres of land, in the county of Greene, for three thousand five hundred and ninety-six dollars, sixty-six and two-third cents. The purchase money was all paid with the exception of one thousand and eight hundred dollars, which was to be paid in six annual installments of three hundred dollars each. To secure the payment of these installments, six several single bills were executed by Connelly, with one William A. Beatty, as his security. These bills were made payable on the first day of October of each succeeding year; and those which fell due in October, 1818, 1819, and 1823 were paid; but those which fell due in 1820, 1821, and 1822 were unpaid, and still due and owing. It was further set forth that both Connelly *and Beatty had [36 died insolvent, the latter a number of years after the last single bill became due; and that there were no means by which the com-

plainant could expect to collect his debt, except by sale of a part, or the whole of the premises.

The bill further sets forth, that on October 23, 1823, and soon after the last installment became due, Roberts took from Connelly a mortgage on the same land, to secure the payment of one thousand dollars. That on December 30, 1824, he took another mortgage to secure the payment of nineteen hundred dollars; and that in September, 1826, he took from the said Connelly and wife a release of their equity of redemption, whereby both the legal and equitable title was vested in him. It was expressly charged that at the time Roberts took these several mortgages and the deed of release, he had full knowledge that Connelly had not paid for the land, but took the conveyance with a design to prevent the complainant from collecting his demand, and to defraud him.

The personal and legal representatives of both Connelly and Beatty, as well as Roberts, were made defendants; and the prayer of the bill was, that Roberts might be decreed to pay the balance of purchase money due complainant, or that so much of the land might be subjected to sale as would raise an equal amount. There was also a prayer for general relief.

The answer of Roberts admitted the sale by complainant to Connelly, but denied that he, Roberts, had any knowledge of the terms. Whether Connelly or Beatty were insolvent, or to what extent they were insolvent, defendant did not know, but alleged that long after October 1, 1823, the former was abundantly able to have paid the complainant's demand. The execution of the two mortgages and release was admitted; but it was denied that at the time the deeds were executed, the defendant had any knowledge that Connelly was indebted for the land. Although he had heard that Connelly was owing Williams, he did not know for what consideration, or in what amount. He denied all fraud, etc. The circumstances connected with the execution of the first mortgage
37] were alleged to be these. Previous to *October, 1823, Connelly was largely indebted to the defendant. About that time Williams applied to him, and requested him to purchase the single bill which fell due on the 1st day of that month. He professed himself willing to purchase, if Connelly would secure the payment. Williams replied that Connelly was abundantly able to secure him, as he had a clear deed of his land. After being repeatedly urged by Williams, and after having conversed with Connelly, he agreed

to make, and did make the purchase, and took the mortgage to secure the payment of the note, together with the amount previously due him. During the whole of this negotiation, Williams did not suggest, or intimate that he had any claim upon the land.

The administrator of Connelly answered, admitting the insolvency of his estate.

The other defendants did not answer.

Many witnesses were examined, and it might be difficult to come to a satisfactory conclusion as to the real state of facts; but in the view which the court have taken of the case, it is not very material, nor is it necessary to recapitulate the evidence.

ALEXANDER, for complainant:

A vendor has a lien on his land for the purchase money, whilst in the hands of his vendee, or assignee, with notice. Garson *v.* Green, 1 Johns. Ch. 308; Champin *v.* Brown, 6 Johns. Ch. 398; Tiernan *v.* Beam and others, 2 Ohio, 384; Brown and others *v.* Gillman, 4 Wheat. 255; 3 Bibb, 183.

Equity does not afford its aid against a purchaser for a valuable consideration, without notice; but a notice of incumbrance stops all proceedings toward the completion of the purchase, or the payment of the money, Frost *v.* Buckman, 1 Johns. Ch. 300; and a party claiming relief as a *bona fide* purchaser must positively and precisely deny any notice, although it is not charged in the bill. 1 Johns. Ch. 266, 301, 302; 2 Johns. Ch. 355; 3. Johns. Ch. 345; 7 Johns. Ch. 65–67.

A defendant is bound to admit or deny all material facts, without being interrogated. 1 Johns. Ch. 76.

*The defendant can not, in the hearing, take advantage of [38 want of jurisdiction in the court he should have demurred. Johns. Ch. 290, 291; 2 Johns. Ch. 369; 1 Ohio, 126, 127.

A careful and critical examination of the evidence shows that Roberts had knowledge of the claim of Williams, and he can not protect himself under the pretense that he is an innocent purchaser, without notice. The allegation in the answer, that Williams assented to the first mortgage, is not responsive to the bill, and requires proof. Of this fact, satisfactory proof has not been given.

MASON and ELLSBURY, for the defendant Roberts:

The principle that the vendor has a lien for the purchase money

upon the lands in possession of the vendee, or his assigns, with notice, is not controverted; but we insist that this principle applies only where the vendor takes no collateral security for the purchase money.

Wherever independent collateral security is taken, it is evident that the vendor did not intend to rely upon the land itself, and although such security should fail, or prove insufficient, the vendor can not afterward resort to his equitable lien. Sugden, 2 Am. ed. 397, and the cases there cited; Grant v. Skill, 2 Ves. & Bea. 246.

We do not insist that the mere taking a note or bond of the vendee will be sufficient to discharge the equitable lien, although such was formerly the law, but we have found no case in which it has been decided, that the vendor retains a lien where he had conveyed the estate, and taken the note or bond of the purchaser, with personal security, for the payment of the purchase money. Such is the case before the court. The case of Tiernan v. Beam, 2 Ohio, 383, is not like this. In that case, the vendor had not parted with the legal title, and had an undoubted right to retain it until the purchase money should be paid. As authority to show that the taking of such security discharges the lien, we refer to the case of Brown and others v. Gillman, 4 Wheat. 255.

If the court should be against us upon this point, we insist that 39] there is no evidence to show that Roberts had any *notice of the claim of Williams, and that he was, in fact, an innocent purchaser, without notice.

ALEXANDER, in reply:

It was no part of the contract between Williams and Connelly, that Connelly should give Beatty as security. It was a mere voluntary thing on his part; and the complainant shall not be prejudiced by it, unless there is proof to show that Williams agreed to rely upon this kind of security, thereby releasing his equitable lien. No such proof has been exhibited.

Opinion of the court, by Judge HITCHCOCK:

The principle that the vendor has a lien upon the land sold for the purchase money, while the same remains in the possession of the vendee, or his assignee with notice, is too well established to be controverted, and it is useless to cite authorities in its support. It is founded on abstract justice.

Where the vendor relies upon the land sold, as the fund from

which he shall recover his compensation, he ought not to be deprived of it. Natural equity would seem to require that before the vendee shall claim the land as his own, absolutely discharged of all claim on the part of the vendor, he should pay to that vendor according to the terms of his contract. The same principle of justice would extend this lien to the vendor in the case of the sale of goods and chattels. It has not, however, been thus extended on account of the perishable nature of the property, and on account of the difficulty of enforcing it, in consequence of the ease with which such property is transferred, and the frequent changes which take place in the right of ownership. Sound policy, too, in a commercial country, dictates that so far as it can be done consistently with justice, possession should be taken as conclusive evidence of personal property. Under the existing circumstances of our own state policy, it would seem to require that this principle should not be extended. Lands are measurably an article of merchandise, passing frequently from one to another, and the less they are incumbered with *such liens, the better for [40 the community. Nor is there the same necessity for enforcing this lien as in England, and, perhaps, in some of the states of this Union. So long as the land remains in the possession of the vendee, it can be reached by execution, and the vendor has complete and adequate remedy at law. If it has been assigned with a view to defraud the vendor, such assignment would be void under the statute for the prevention of frauds and perjuries.

Although this lien exists in favor of the vendor, yet if it can be shown that he depends upon, takes, or looks to any other individual collateral security, it ceases, or, more properly speaking, it never attaches. It has been held that by taking a note or bond, the lien is discharged, inasmuch as it shows that the vendor does not rely upon the land itself, but upon the personal security of the vendee. Amb. 724. The doctrine is now well settled, however, that the taking of a covenant, note, or bond does not interfere with the lien where such covenant, note, or bond is executed by the vendee. 1 Bro. C. L. 420; 2 Ves. 389; Sug. Vend. 354, 355.

But "if the vendee takes a distinct and independent security for the purchase money, his lien on the estate is gone, as it clearly appears he did not trust to the estate as a security for his money." Sug. Vend. 253; 6 Ves. 483.

So if a vendor take a mortgage of the estate sold for a part of

the purchase money, he loses his equitable lien for the balance, inasmuch as he thereby evinces his election, that the estate should be charged with part only. Sug. 323; 1 Ver. 281. In truth, any act done, any independent collateral security taken, discharges the lien. And for this obvious reason, it clearly evinces that the vendor relied on something, other than the estate from which to recover the purchase money. It is immaterial whether this be personal or other security. That collateral personal security operates to discharge the lien, is expressly decided in the case of Brown and others *v.* Gillman, 1 Mason, 214. The judge says, "on a careful examination of all the authorities, I do not find a single case in which it has been held, if the vendor take a personal collateral security, binding others, as well as the vendee, as for instance a bond or note, with a security or indorser, or a collateral security, by way of pledge or mortgage, that under such circum-
41] stances a lien *exists upon the land itself." This case was decided in the Circuit Court of the United States in Massachusetts. It was afterward taken to the United States Supreme Court, and the same principle there settled. 4 Wheat. 255.

The case of Elliot *v.* Edwards, 2 Bos. & Pul. 181, may at first view seem to controvert this position; but in looking into that case, it will be found that there was an express stipulation in the contract, that the premises should not be assigned or underlet, until the whole of the purchase money was paid, without an express license, in writing, under the hands of the vendor and the security.

Now, what are the circumstances of the case before the court? Williams sold the premises to Connelly, and received a part of the purchase money. He took no mortgage to secure the payment of the balance; but he took notes, or single bills, signed by Connelly and Beatty. Why did Beatty sign these notes? Counsel for the complainant says it was merely a voluntary act, in no way provided for by the contract. But in the absence of proof, we can not take that view of the subject. Beatty was received by Williams as security for the payment of the money, which shows that the latter did not rely upon the land itself, as clearly as the taking of a pledge or mortgage of any other property would have done. If the case of Brown *v.* Gillman was correctly decided by the Circuit and Supreme Courts of the United States, then, by taking this security, and by parting with the title, Williams lost his equitable lien. The

circumstance that Beatty afterward became insolvent, can make no difference; the lien once gone, is gone forever. We are satisfied with the law as laid down in that case, and believe it to be decisive of the question now before the court.

But there is a class of cases where a different principle prevails, and where the vendor retains a lien, notwithstanding he may have taken either personal or other collateral security. Where the title remains in the vendor, and the purchaser is in default for the non-payment of the whole, or any part of the purchase money, the vendor will not be compelled to part with his title until the purchase money is paid. And the circumstance of taking the collateral security will not vary the case. It was upon this principle that the case *of Tiernan v. Beam and others, 2 Ohio, 383, was de- [42 cided. In that case, Tiernan, as a creditor of Beam, was seeking to subject two quarter sections of land to sale, for the satisfaction of a judgment in his favor against Beam. Beam had only an equitable interest in the lands, having purchased them, together with others, from Newman. The purchase money had not all been paid, although the whole was due; but enough had been paid to meet the price of these two quarter sections. No legal title had been transferred to Beam. The principle matter in dispute was, whether the court would compel the defendants, or those holding the legal title, to part with the same, until the purchase money for all the land was paid. It was holden by the court, that Tiernan stood in no more favorable situation than Beam. And further, that upon the application of Beam, Newman, or those holding the legal title, could not be compelled to part with the same until the balance of the purchase money was paid, that balance being then due. This decision, we apprehend, is consistent with the plainest principles of justice.

Where the vendor has retained the title in his own hands, where, by the terms of the contract, he is to retain it until the purchase money is paid, to compel him to part with it before the payment, because he has taken independent collateral security, would be manifestly unjust. It would, in truth, be changing the nature of the contract. It is the duty of this court to enforce, not to make, or change the contracts of parties.

The judge who delivered the opinion of the court, had this state of the case in view. Such was the nature of the case then under consideration. In delivering that opinion, he says, "that the ven-

dor has a lien on the premises sold, for the purchase money, and that his lien is not affected by conveying the premises, and taking a note or bond, with personal security, for the money." This is correct, as it respected the case then before the court. There had been no conveyance by deed, transferring title, although there was a title bond or contract. And we know, according to the custom of the country, this is so far a conveyance, that under it the pur-
43] chaser takes possession. But if it was intended *to use the word conveyance, in its strict technical sense, as transferring title, we must think the position is not warranted either by authority or the well-known principles of equity. It is not without great deliberation, and much hesitation, that we have come to this conclusion. The well-known character of the judge who delivered that opinion, for legal and general knowledge, for integrity and purity of purpose, entitles his *dictum*, much more his deliberate opinions, to the highest consideration. The authorities cited in support of this opinion are 9 Ves. 209; 1 Johns. Ch. 308; 3 Eq. Cas. 682; 1 Ver. 267; 3 Atk. 272; 6 Ves. 752; 3 Bibb, 183; 2 Wash. 142; B. C. R. 301; 2 Ves. 622.

Upon a careful examination of these authorities, it is believed that no one of them supports the broad position, as laid down by the judge.

In the case cited from 6 Ves. security in stock had been taken. The court expressly declines deciding the question, whether every security taken would discharge the lien of the vendor, holding, however, in that case, that it had been discharged.

The case in 9 Ves. is a case upon marshaling assets. In the course of the discussion a question is made as to the lien of the vendor, but nothing is decided which is applicable to the question now under consideration. In that case, too, it is clear that the title of the premises had not been transferred to the vendee.

In the case in 2 Ves. 622, the question is not raised.

The case in 3 Atk. 272, is somewhat similar to the one in 9 Ves., and so far as respects the question now under consideration, settles nothing further than this, that as between vendor and vendee, the former has a lien upon the premises for the purchase money.

The chancellor in 1 Johns. Ch. 308, decides that taking a note for the purchase money does not discharge the lien; but nothing is said as to the effect which would be produced by taking such note with independent personal security.

Neither the case reported in 3 Bibb, nor the case of Cole *v.* Scott, 2 Wash. 141, support the position of the judge in the case of Tiernan *v.* Beam, etc. In the case of Cole *v.* Scott, the title was in the vendor, and the idea seems to be *intimated, that if security [44 had been taken, even under such circumstances, the lien would be gone. The president of the court says, "The doctrine that a vendor of land not taking security, nor making a conveyance, retains a lien upon the property, is so well settled as to be received as a maxim. Even if he hath made a conveyance, yet he may pursue the land in the possession of the vendee, or a purchaser, with notice. But if he hath taken a security, or the vendee hath sold to a third person, without notice, the lien is lost."

Taking these cases singly or collectively, they go no further to establish the principle that a vendor, taking an independent collateral security, although he parts with the title, has an equitable lien upon the land in the possession of the vendor, or his assignee, with notice, for the purchase money. A principle so well established, according to the opinion of the court in Virginia, as to be received as a maxim. There is nothing in these cases to contravene the opinion of the Supreme Court of the United States in the case of Brown and others *v.* Gillman, before referred to.

The principal reliance of the counsel for the complainant is upon the case of Tierman *v.* Beam, etc.

As before remarked, we believe that case to have been correctly decided, and we should feel ourselves bound by its authority. But we are unwilling to extend it beyond a case similarly situated. For the reason already urged, and from the authorities cited, we are led to the conclusion that the broad position assumed by the judge in that case was incidentally taken. It is not, in our view, consistent with either principle or authority.

Such being the opinion of the court, it is unnecessary to go into a critical examination of the testimony, or of the other points, made by counsel. The complainant, by his own showing, has no lien upon the land; he is entitled to no decree; his bill must be dismissed with costs.

45] JOHN FARRIER *v.* ESTHER CAIRNS, EXECUTRIX.

Where defendant dies after suit brought, and the action survives, the plaintiff can not recover costs against an executor or administrator.

THIS cause came before this court by adjournment from the county of Muskingum.

It was an action on the case for a nuisance, brought against the testator in his lifetime, and to which his executrix, after his death, was made a party by *scire facias*, under the statute of Ohio.

The suit was commenced January 26, 1829. After issue joined the defendant died. At December term of the common pleas, 1830, the death was suggested, and a *scire facias* awarded and issued, returnable forthwith, making the executrix a party defendant. July term, 1831, there was a verdict for the plaintiff in the common pleas, from which the defendant appealed. In the Supreme Court there was also a verdict for the plaintiff, damages assessed at five hundred dollars. A question was made whether the plaintiff could recover cost, and the decision of that question was adjourned.

S. W. CULBERTSON, for plaintiff.

C. B. GODDARD, for defendant.

Opinion of the court, by Judge HITCHCOCK:

Previous to the year 1829 no costs could be recovered against an executor or administrator, in a suit commenced against them, within the time limited by the law for the settlement of the estate of their testator or intestate. By the act of the 10th of February of that year, amendatory to the "act defining the duties of executors and administrators," 27 Stat. 68, provision is made, that in any action upon contract, commenced against an executor or administrator, where the claim or demand shall have been presented and rejected, the plaintiff shall be entitled to recover costs, provided the action shall have been commenced after one year from the probate of the will, or the appointment of the administrator, and provided 46] the claim shall *have been presented at least sixty days before suit be commenced. It is believed, however, that where the action was commenced during the lifetime of the testator, or in-

testate, and revived after his death, under the statute, against his personal representative, the common practice has been to render judgment for costs. As to the correctness of such practice, we are not aware that any decision has been made by this court. It is, to say the least, doubtful, whether a correct construction of the statute would justify such a course. Without the statute the action would abate by the death of the party, and it is hardly to be supposed that the legislature, by permitting the action itself to survive, intended to place the plaintiff in any preferable situation as to costs, to that in which he would have been placed, by the commencement of a new suit. Further, in an action like the one now before the court, but for the statute, not only the action, but the cause of action would have died with the party.

Whatever doubt there might be, in this respect, under the act of 1824, there can be none under the statute now in force. In section 69 of the practice act, passed March 8, 1831, 29 Ohio L. 70, it is enacted, "that no suit or action, except those mentioned in section 62 of the same act, shall abate by the death of either of the parties. The actions thus mentioned are "actions for libel, slander, malicious prosecution, assault, or assault and battery, actions on the case for nuisance, or against justices of the peace for misconduct in office." Section 68 of the same act provides, that after the executor or administrator is made party, "the cause shall be thereafter proceeded in, and tried in the same manner, and such judgment be rendered therein, as if such suit or action had been originally brought against such executor or administrator." If this suit had been originally brought against the executrix, the judgment to be rendered would be a judgment for the damages alone, without any costs.

It has been urged, however, that inasmuch as this suit was commenced previous to the passage of the act of March, 1831, the provisions of that act can not be taken into consideration in the decision of this question, but that the same must be decided with reference to the pre-existing laws. A *majority of the court are of [47 a different opinion. Section 120 of this act repeals the practice act of February 18, 1824, and all laws amendatory thereto, saving, however, to all persons, "all rights acquired, and duties and obligations incurred under, or by virtue of" the repealed acts. The same section concludes as follows: "And all actions, suits, causes, or matters, pending at the time this act shall take effect,

may be prosecuted and defended, and carried into final judgment and execution, under the provisions of this act." So far, then, as relates to the mode of practice, the judgment and execution, the intention of the legislature is manifest, that in all suits pending, as well as in those which might afterward be commenced, the principles of this act should govern. "All rights acquired, duties or obligations incurred," are saved, but nothing further.

What "rights" had this plaintiff acquired at the time this law took effect? Certainly not the right to recover any specific sum in damages. The amount of damages, if any, were still to be ascertained by a jury. It is equally certain that he had acquired no right to any judgment for costs. This must depend upon the statute law in force at the time judgment should be rendered. Costs are unknown to the common law. They are given only by statute, and may be changed, or entirely taken away, at the will of the legislature. It is true, had there been an interlocutory order upon the defendant for the payment of any part of the costs, occurred at any stage of the proceedings, an "obligation" would have been "incurred" by the defendant to make such payment, and a "right" would have been "acquired" by the plaintiff to enforce it. But there is no such order. The only right, then, acquired by the plaintiff, is to have his case already instituted, tried, determined, and carried into judgment. Had the suit been commenced subsequent to June 1, 1831, the time when the act of March of that year took effect, it would have died with the defendant. Under that statute, actions on the case for nuisance abate by the death of either party. They do not survive. As, however, this action was commenced previous to June, 1831, and during the existence of statutes, in virtue of which, such cause of action did sur-
48] vive, the plaintiff had acquired a right, which was *secured to him by the saving clause of section 120 of the practice act before referred to, of having his action thus commenced, tried and condemned. But it must be tried, determined, and carried into judgment, according to the law in force at the time of the trial. All other laws regulating the practice of the courts are then repealed, and that law precludes the plaintiff from the recovery of costs. Judgment must, therefore, be entered for the amount of damages assessed, but without costs.

Judge COLLET dissented.

JOHN RIDDLE v. W. P. BRYAN AND OTHERS.

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Under the judgment and execution law of 1816, a judgment voluntarily confessed on process issued during the term and execution issued within ten days, must be postponed to a judgment entered at a subsequent day of the same in a suit pending upon regular process, though no execution was sued on the latter judgment until after ten days.

Judgment and execution law of 1822 did not divest liens of former judgments where execution was levied within one year, and levy continued.

Purchaser of land at sheriff's sale takes the title, as held by the debtor, subject to prior existing liens.

THIS was a suit in chancery in the county of Hamilton, where it stood upon bill and demurrer, and was adjourned here for decision.

The object of the bill was to quiet the complainant in the title and possession of a certain tract of land therein described, situate in the county of Hamilton, and which he claims to hold, by virtue of a deed from one Nicholas Longworth, bearing date April 4, 1829.

The case made was as follows: On January 19, 1820, the Farmers and Mechanics' Bank of Cincinnati commenced suit against one Andrew C. Dunseth, in the court of common pleas of Hamilton county, that court being then in session, the term having commenced on the 6th day of the previous December. On the same day, Dunseth appeared in open court, and confessed judgment in favor of the bank for six thousand dollars damages, and nine dollars and eighty-one cents costs. Upon this judgment, execution was taken out on February 10, 1820, and within ten days after the close of the December term of the court, and on the same day was delivered to the sheriff. On the next *day thereafter, the [49 sheriff levied upon the premises now in possession of the complainant, as the property of Dunseth. This execution being returned, and the property unsold, a *vendi.* was issued on December 10, 1820, the property appraised on January 12, 1821, and on the 16th day of the same month sold to Longworth for six thousand dollars, this being more than two-thirds the appraised value. At the April term of the same court of common pleas, 1821, this sale was confirmed by the court, a deed ordered, and executed.

W. P. and F. M. Bryan, on October 22, 1819, brought suit against

A. C. Dunseth and Buckner, before the same court of common pleas, then setting in Hamilton county. The suit was commenced by summons, which was made returnable forthwith, and was served on Dunseth, Buckner not being found. Declaration was filed on the 30th of October, and judgment recovered at the next December term. This judgment was actually rendered on January 14, 1820, for one thousand and forty-nine dollars and twenty-one cents damages, and twenty dollars costs. Execution issued upon this judgment, on the 7th of July, and was levied on the same premises on August 14, 1820. Under this levy, the Bryans are still attempting to effect a sale. The prayer of the bill was that the complainant might be quieted in his title and possession, and that the Bryans might be restrained from further attempts to sell the premises.

LONGWORTH and WORTHINGTON, for complainant.

N. WRIGHT, STORER and FOX, for defendants.

Opinion of the court, by Judge HITCHCOCK:

This is an application in chancery, under section 9 of the "act directing the mode of proceeding in chancery," passed January 22, 1822, 22 Ohio L. 75, and the first question is, whether it be a case within the jurisdiction of this court. If the question were new, there might be some doubt. No sale made under the judgment 50] of the Bryans *can affect the rights of Riddle, if he has the legal title. The subject of liens seems to be properly of legal jurisdiction. We can not, however, consider the question as open. It seems to have been decided in the case of the Bank of the United States v. Shultz, 2 Ohio, 495; Burnet v. City of Cincinnati, 3 Ohio, 86, and in the case of Norton v. Beaver, Curtis and others, decided at the present term. In all these cases this court took jurisdiction, and they are in many of their features similar to the one now before us.

In order for a correct decision of this case, it is necessary to inquire:

1. Which of the two judgments had originally the preferable lien.

2. If the elder judgment had originally the preferable lien, have the Farmers and Mechanics' Bank gained any advantage by

superior diligence? Have the Bryans lost any right by *laches*, or delay?

3. Has the subsequent legislation of the state changed, or in any manner varied the rights of the parties?

4. Did the sale, by sheriff, to Longworth, vest in him a legal title to the premises, divested of the lien of the elder judgment?

The solution of all these questions must depend upon a proper construction of the statutes, regulating judgments and executions.

The law in force, when the judgments referred to in the bill were rendered, was the act of January 31, 1816, 14 Ohio L. 174. Section 2 of this act provides, "that the lands, tenements, and real estate of the defendant shall be bound and liable to the satisfaction of the judgment, from the first day of the term in which such judgment is obtained." Section 7 contains this proviso: "That judgments voluntarily confessed in open court shall only have a lien upon lands, tenements, or hereditaments, from the day on which they are actually signed or entered." The judgment of Bryans was entered on January 14, 1820; but under section 2 of the act it operated as a lien from December 6, 1819, that being the first day of the term in which the judgment was rendered. This judgment was recovered in the ordinary course of judicial proceeding. *The judgment of the Farmers and [51 Mechanics Bank operated as a lien only from January 19, 1820, because it was on that day "voluntarily confessed in open court," and under the proviso of section 7 such judgments have a lien only from the day on which "they are actually signed or entered." Bryan's judgment, then, was the elder judgment, and originally had the elder and preferable lien. This is not controverted by the counsel for complainant.

We will next inquire whether the bank gained any preference by superior diligence after judgment, or whether the Bryans lost any right by *laches* or delay.

The execution of the bank was taken out and delivered to the sheriff on the 10th, and levied on February 11, 1820. This levy was held up until January 16, 1821, when the premises levied upon were sold by the sheriff to Longworth, under whom the complainant claims title. Bryans' execution was issued on the 7th of July, and levied upon the same premises on August 14, 1820, and under that levy they are still striving to effect a sale. There does not seem to have been any culpable neglect on the part of either

of the judgment creditors. The bank execution was first delivered to the sheriff, and it is intimated, although not very confidently urged by the counsel for complainant, that by being thus first delivered, this execution gained a preference under section 3 of the act of January 31, 1816. 14 Ohio L. 174. If we were to look to the section alone, without reference to other parts of the statute, we should come, undoubtedly, to this conclusion. But it is the duty of the court to examine the whole statute, and, if possible, give such a construction that the whole shall take effect, and the different parts harmonize together. Sections 3, 4, and 5 of the act of 1816 are intimately connected, and the substance of the three are embodied in section 4 of the "act regulating judgments and executions," passed February 4, 1824. 22 Ohio L. 108. This section is as follows: "Where two or more writs of execution, against the same debtor, shall be sued out within the term in which judgment was rendered, or within ten days thereafter, and 52] when two or more executions against the *same debtor shall be delivered to the officer on the same day, no preference shall be given to either of such writs; but if a sufficient sum of money is not made to satisfy all executions, the amount made shall be distributed to the several creditors in proportion to the amount of their respective demands; in all other cases the writ of execution first delivered to the officer shall be first satisfied," etc. This section, as well as other parts of the judgment and execution laws has frequently been in review before the court, and in the case of Patterson v. Sheriff of Pickaway County, 2 Ohio, 395, it received a construction. It was held to have been intended "to provide for cases where there were two or more judgment creditors, having equal rights, and where there is no priority of lien, as when the judgments are recovered in the same term; for cases where the judgment does not operate as a lien, but the property is bound only from the time when seized in execution, as goods and chattels," etc. With this decision we are perfectly satisfied. To give the section a different construction would defeat some of the most essential provisions of the statute, and destroy the consistency of the law. Take it literally and the lien takes effect, not as expressed in the statute, "from the first day of the term in which the judgment is rendered," but from the day of delivering the execution to the sheriff; that is, so far as respects priority. Such could not have been the intention of the legislature.

In the case before the court the two judgments were rendered during the same term of the court, but the judgment creditors had not "equal rights; there was a priority of lien;" and this superiority of right, this "priority of lien," is not lost to the elder judgment creditor merely from the circumstance that execution upon the junior judgment was first taken out, and first delivered to the sheriff.

Has the subsequent legislation of the state changed, or in any manner varied the rights of the parties.

It is not pretended that the act regulating judgments and executions, passed February 24, 1820, 18 Ohio L. 180, varied, or in any manner changed these rights. By the provisions of section 13 of the act, that act of January 31, 1816, is continued in force as to all judgments rendered *prior to June 1, 1820. But it [53 is strenuously contended that in consequence of the act of February 1, 1822, 20 Ohio L. 69, Bryans lost their priority of lien. It is said that under this law every judgment has a lien upon the real estate of the judgment debtor, from the first day of the term in which the judgment is entered, whether it be a judgment by confession, or obtained in the ordinary course of judicial proceeding, and that by this act the acts of 1816 and 1820 are repealed without any saving clause. From which counsel infer that the priority of the lien is destroyed, and both judgments placed upon an equality. But is this a just inference to be drawn from the premises? Assuming it as incontrovertible, under the law of 1816 and 1820, the Bryans had a priority of lien, a preferable right, this court will not, by the construction of a subsequent statute, divest them of that right and that lien, unless driven to the necessity of so doing by the express letter and spirit of the statute to be construed. It is not, however, the lien of the judgment alone upon which the defendants rely. Upon this judgment execution had, within the time limited by law, been taken out and levied upon the premises, and this, too, at a time when the judgment creditors had a perfect right that the levy should be made. It certainly would be a forced construction to say that because the legislature have provided that after 1820 all judgments rendered in the same term, whether by confession or otherwise, should have an equal lien. It was intended that this legislation should have a retrospective operation, and destroy all priority of liens upon judgments previously rendered. It would be but to say in gen-

eral terms that the repeal of the pre-existing judgment and execution laws, by the statute of 1822, destroyed all pre-existing judgment liens. Admitting that the legislature have the power to do this, we will wait until it is done in express terms before we shall say they have exercised that power.

But are the counsel for the complainants correct in saying that in the act of February, 1822, there is no saving clause as to pre-existing judgments. Section 16 of that act, 20 Ohio L. 75, provides, "that in all cases where real estate has heretofore been 54] levied upon, and appraised according *to the provisions of the act regulating judgments and executions in force at the time such judgment was rendered, and shall have been twice advertised and offered for sale, and shall remain unsold for want of bidders, it shall be the duty of the court, from which such execution issued, on motion of the plaintiff, at any time within six months next after the taking effect of this act, to set aside such levy and appraisement, and award a new execution, which shall be levied according to the provisions of this act, and after such levy the judgment on which the execution issued shall not operate as a lien on the residue of the debtor's estate, to the prejudice of any other *bona fide* creditor; but if the plaintiff, in any such judgment, shall not, within the time aforesaid, cause the levy and appraisement to be set aside as herein provided, then and in that case such judgment shall operate as a lien only on such part of the debtor's estate as shall have been levied on," etc. This whole section, or the greater part of it, has reference to previous judgments. The object seems to have been to excite judgment creditors to diligence in enforcing their claims, and to prevent one creditor from hindering others in collecting their debts. So far from destroying pre-existing liens, it recognizes them. If a judgment creditor was dissatisfied with his previous levy and appraisement, he might have it set aside, and have a new execution. If not dissatisfied, he might continue his levy, and "then, and in that case," such judgment should "operate as a lien upon such part of the debtor's estate as shall have been levied on." So far, say the legislature, "it shall operate as a lien," and no farther. A new lien is not created; one already existing is continued, and continued, too, from the time when it commenced running. It would seem there could be no difference of opinion as to the intention of the legislature. They did not intend to destroy rights already acquired,

they did not intend to interfere with the priority of liens, but they did intend to prevent one judgment creditor, who might have a prior lien, and who might be actuated by principles of favoritism toward a judgment debtor, from keeping the whole estate of that judgment debtor locked up from other judgment creditors. The Bryans were satisfied with the levy which had been made; they did not move to have the execution, *the levy, or the ap- [55 praisement set aside, and the only injury which could result to them, under the law of 1829, would be that their judgment could not operate as a lien upon any other part of the debtor's estate to the injury of any other judgment creditor.

The act of February 4, 1824, 22 Ohio L. 108, contains no provision which would lead the court, in reference to the case now before us, to a different conclusion from the act of 1822. Section 17 contains this provision: "That no judgment heretofore rendered, or which may be hereafter rendered, on which execution shall not have been taken out and levied before the expiration of one year next after the rendition of such judgment, shall operate as a lien on the estate of any debtor, to the prejudice of any other *bona fide* judgment creditor." Bryans' execution was "taken out and levied" within one year after the rendition of the judgment, and by force of this section the lien is continued.

The last point to be considered is, whether the sale by the sheriff to Longworth vested in him the legal title to the premises, divested of the lien of the elder judgment.

In favor of the principle that a sheriff's sale, upon a junior judgment, destroys the lien of an elder judgment, the court are referred to 12 Johns. 162. It would seem to me that we might as well be governed by the obvious meaning of our own statute, as by a reported case in the State of New York, unless it shall first be shown that the statute in that state is similar to our own. Section 16 of the act of January 31, 1816, 14 Ohio L. 177; section 20 of the act of February 24, 1820, 10 Ohio L. 187; section 11 of the act of February 1, 1822, 20 Ohio L. 78, prescribe general rules respecting deeds made by sheriffs for lands sold on execution. These several sections of the different laws, if not the same literally, are the same in substance. They not only point out the mode or manner in which the deed shall be made, but declare the effect. That effect is to vest in the purchaser "as good and as perfect estate in the premises therein mentioned, as was vested in the said defend-

ant at or after the time when the said lands became liable to the satisfaction of the said judgment." These lands became liable to 56] the satisfaction of the judgment of the bank on *January 19, 1820, the day on which Dunseth confessed judgment. On that day the lien attached. What "estate" had Dunseth on that day in the premises? He had, so far as appears to the court, an absolute estate in fee simple, subject, however, to the lien of Bryans' elder judgment. This "estate" was transferred by the sheriff's sale to Longworth. But it was transferred incumbered with the same lien. This was all the estate which Dunseth himself could have conveyed, and unless we make some interpolation in the statute, the sheriff can not transfer a better estate, or make a more perfect title than the judgment debtor himself could have made to his creditor on the day the judgment was entered against him.

Upon the whole case, the court are clear in the opinion that Bryans' judgment had, originally, the preferable lien; that this preference has not been lost in consequence of any superior diligence on the part of the bank, or in consequence of any laches or neglect on the part of Bryans; that it has not been taken away by any subsequent legislation of the state; that the sale by the sheriff to Longworth did not divest the premises of this lien; but that it is good and subsisting, and may still be enforced. It follows that the demurrer to the bill is well taken, and must be sustained.

The bill is dismissed at complainant's costs.

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COMMISSIONERS OF THE CANAL FUND v. NATHAN PERRY.

Undertakings by written subscription to contribute money or other property, in aid of public works, are valid contracts, that may be enforced in courts of justice.

Upon a promise to pay to the commissioners of the canal fund, suit can not be maintained in the individual names of the commissioners, or by them as a corporation.

THIS suit was brought in the name of Ethan Allen Brown, Ebenezer Buckingham, and Simon Perkins, described as commis-

sioners of the canal fund. The declaration was in assumpsit; the plea, the general issue. At the trial in Cuyahoga county, the plaintiffs gave in evidence a contract subscribed by the defendant, with others, in the following words:

"We, the undersigned subscribers, do hereby promise to *pay [57 the commissioners of the canal fund of the State of Ohio, for the use of said fund, the sums severally annexed to our names, in three several equal installments, the first on January 1, A. D. 1827; the second, on January 1, A. D. 1828; and the third and last, on January 1, A. D. 1829, upon condition that the canal be located on the east side of the Cuyahoga river, from the lower rapids to the village of Cleveland. Cleveland, December 6, 1825."

Various questions arose upon the legal effect and character of this writing, and upon other points, all of which were ruled for the plaintiffs, in favor of whom a verdict was rendered. The defendant moved for a new trial, and the motion was adjourned here for decision.

The case was considered in conjunction with another involving to a certain extent the same principles. It was that of the Comm'rs of the Canal Fund *v.* Ex'rs of Thomas Worthington. The contract upon which it was brought was dated December 1, 1825, and the plaintiffs in the suit were Ebenezer Buckingham, Simon Perkins, and Samuel F. McCracken, commissioners, etc. In this case, adjourned from the county of Ross, a verdict had passed for the plaintiff, and the questions in the cause came up on a motion for a new trial.

The case was argued by PEASE, WILLEY, WILCOX, KING and ALLEN, in support of the motion for a new trial.

By LEONARD G. SWAN and ANDREWS, against it:

The counsel for the defendants contended for a new trial on the following grounds:

1. That the canal fund commissioners are not authorized to to make or sue upon such a contract. Canal Doc. 1819, 160, 52, 176.

2. That they are not a corporation capable of suing by a corporate name. (Same documents.)

3. That the paper offered in evidence is a *nude pact*, without

consideration and executory. On this point, and the preceding 58] one, embraced within it in part, the following *authorities are cited. 5 Mass. 491; 6 Mass. 253; 3 B. & P. 147; 3 Wash. C. C. 10; 1 Peters C. C. 46; 5 Pick. 250; 6 East, 110; 1 Cow. 26; 1 Term, 418; 4 East, 568; 7 Term, 109; 6 Taunton, 551; 1 Saund 20; 2 Term, 569; 10 Coke, 100; 1 Levinz, 192; 8 Mass. 292; 11 Mass. 113; 3 Term, 653; 1 Com. on Cont. 2, 9, 16; 2 Com. on Cont. 365.

4. That the plaintiffs named on the record are not the promisees named in the supposed contract.

The counsel for the plaintiffs contended:

1. That the subscription paper offered in evidence is a valid, legal contract, founded in a good and valuable consideration. Canal Doc. 52, 165; 20 Johns. 89; 7 Johns. 112.

2. That the commissioners of the canal fund are a corporation capable of suing. Sec. 4 of the act to provide for improvement of the state by canals; 2 Johns. Ch. 335; 8 Johns. 424; 18 Johns. 418; 13 Mass. 193; 1 Cowen, 261; Canal Doc. 154, 160.

3. That the names of the commissioners may be considered surplusage and rejected. 3 Ohio, 227; 2 Ohio, 156. As to the second point, or the argument on it, the following authorities were cited: 10 Rep. 29; 1 Strange, 253; 6 Bar. 388; 6 Vin., tit. Corporation, 265; 7 Cranch, 306; 15 Johns. 358; 14 Johns. 238.

There were other points embraced in the briefs of counsel, which are not noticed as being particularly applicable to the Chillicothe case, which remains undecided, as to points arising therein, differing from the Cuyahoga case.

Judge WRIGHT delivered the opinion of the court:

The first question claiming our attention in this case is, whether the subscription paper, upon which the suit is founded, affords a legal foundation for the action? It has been repeatedly decided in this state and elsewhere, that promises to pay money for the erection of school and court-houses, churches and bridges, would, the work being undertaken or done, sustain the action of assumpsit. A moral obligation is sufficient to support an action on an 59] express promise. 6 Mass. *40; 3 Mass. 483. The subscription we are now called to examine does not rest alone upon the general principle, but may invoke to its aid a positive enactment

of the legislature. Section 10 of the act to provide for the internal improvement of the State of Ohio by navigable canals, 23 O. L. 57, expressly authorizes the canal commissioners to make application, in behalf of the state, to Congress, to land-holders, through or near which the canals may be proposed to pass, to public and private bodies politic, and to all the citizens or inhabitants of this or any other of the United States, for grants or donations, in land or money, for the purpose of aiding in the construction of said canals, according to the direction of the donors, and to take, to the state, such conveyances as may be competent to vest in the state a good title in the lands so to be granted.

It has not been disputed, nor even suggested, that the legislative competency in Ohio falls short of determining what shall be esteemed a sufficient consideration, upon which a contract or promise may be enforced in our courts of justice. Unless this competency can be questioned, the enactment referred to is conclusive of the legal efficacy of contracts under it. The contract here is not against good policy or good morals, nor against law, but in conformity with its express provisions. It is urged, however, that the statute only contemplates grants of land, and donations of personal property, *in presenti*, and confers no authority to make contracts for either. We are bound to suppose the general assembly intended to confer power, to effect the only object they had in view. They have employed language too plain to admit any great latitude of construction; language addressed to the public spirit, and the interest of individuals. Various routes for canals were contemplated; and in determining the choice, much depended upon the amount of contributions. Individual contributors would give more or less, according as the route adopted, or other circumstances, might be supposed to enhance the value of their property. Provisions looking to such a state of things were inserted in the law, subjecting the donations to the direction and conditions of the donor. Could a person be expected to give money or land, upon condition the canal should take a certain route, before that route *was settled, and trust to circumstances to ob- [60 tain a return of the gift, or reconveyance of the land, if another route were selected? We think the common usual method of doing such things was in the contemplation of the law, the obtaining a promise to give or convey, at an agreed time, upon whatever con-

dition the giver chose to impose, and the obtaining written evidence of the undertaking. One proposes to give one thousand dollars in a year, if the canal goes through his land. The construction contended for by the defendant's counsel, would deprive the state of power to avail itself of aid under such a condition. We are unable to perceive any sound reason against the making a valid contract, under the law, to pay on the happening of the condition.

Have the plaintiffs a right to sue on the contract? The declaration is upon a written promise, dated December 6, 1825, "to pay to the commissioners of the canal fund of the State of Ohio, for the use of said fund," the sum claimed, "upon condition that the canal be located on the east side of the Cuyahoga river." The suit is in the name of Brown, Buckingham, and Perkins, "as commissioners of the canal fund of the State of Ohio, for the use of said fund." It is averred that the said B., B., and P. were commissioners of the canal fund, when the money became due, and still are commissioners. At the date of the subscriptions, Trimble was commissioner with Brown and Buckingham; Perkins was appointed in the room of Brown, February 7, 1826. The individuals, therefore, named as plaintiffs were not, in fact, parties to the contract—the paper is not negotiable, and no transfer of it is alleged, and could not properly be received in evidence, in their favor. 6 Mass. 253; 10 Mass. 360; 5 Mass. 491. It is claimed that the fund commissioners are a corporation, with power to sue, and that their names may be rejected as surplusage; and, also, that inasmuch as the defendant has pleaded over to to the action, he can not now object to its form, or the right of the plaintiffs to recover, as they have declared.

Is the defendant procluded, by pleading over, from objecting the inability of the plaintiffs to sue? In the Mayor, etc., of Stafford *v.* Bolton, 1 Bos. & Pul. 40, the court held the misdescription of a 61] corporation like a mere misnomer of a *natural person, pleadable only in abatement, while the non-existence of a plaintiff or corporation was matter in bar, of which the defendant might avail himself, after pleading over. See also 1 Saund. 340, n. 2; Com. Dig. E, 16. The defendant can only plead *nulitiel corporation in bar.* Bro. Misnomer, 73. Pleading to the merits has been held by the Supreme Court of the United States to be an admission of the capacity of the plaintiff to sue. 1 Pet. 386. The general issue admits the competency of the plaintiffs to sue, in the

corporate capacity in which they have declared. 4 Pet. 501. In that suit, the plaintiffs had described themselves "a corporation duly established," and no individuals were named in the writ or declaration. Upon first view, we were inclined to consider this decision conclusive against the defendant, in this stage of the proceedings, but upon closer examination, we think the case eaily reconciled with the others cited. If in this declaration, only the corporate name of the fund commissioners was set out, and it was averred they were a corporation, etc., the general issue might be held to admit its truth, but such is not the case. The individuals named have been treated by the officers of the court, and the counsel on both sides, as the plaintiffs. Shall we now allow them to strike their names from the record, against their own understanding of the law, and deduce from legal fiction an admission that it was not them, but the description they gave themselves, and affixed to their names, the defendant was called into court to answer? The complaint is by B., B., and P., as commissioners of the canal fund, upon an indebtedness to them. We feel constrained to look upon this allegation as the plaintiffs themselves seem to have considered it in their proceedings, as descriptive of the persons suing, not as a substantive description of a mere corporative plaintiff, and, therefore, that its truth is not admitted by pleading over.

But are the canal fund commissioners a corporation, empowered to sue as such? It is not necessary in this case to determine, whether, for any purpose, this board of commissioners may be held a *quasi* corporation. An examination of the acts creating it, without aid from legal subtleties, would impress no one with the idea that the legislature intended *to create a corporation. The ob- [62 ject was, to create certain public agents, to perform certain duties for the state, a majority of whom should determine its acts. Power was given to the board, thus created, to borrow money on the credit of the state, to receive and manage the canal fund, to pay interest, and finally, to disburse the fund to the canal commissioners, to pay for a state work, and, for its engagements, the means and faith of the state were pledged. Evidently these commissioners were created to transact the business of the state, solely upon its responsibility. Can it be supposed, for one moment, that capitalists were expected to supply these persons, upon their own individual or corporate liability, with several millions of dollars, to

be expended upon the works of another corporation? If the act creating this board of commissioners confers only corporate powers upon the individuals composing it, does it not follow that only their corporate means would be held for their engagements? We may ask, in the forcible language of one of the counsel for the defendant, what single feature of a corporation do they possess? They have no name given them as such, no power of perpetuating their succession, no common seal, no power to make any contracts, "except in the name, and for the state," or hold any property upon which execution could be levied, in case of a judgment against them. Mere agents of a corporation, the state, with limited and specified power, for a limited purpose, their acts, done agreeably to the authority delegated to them, are the acts of the State of Ohio, binding upon the state, not upon the commissioners, either as corporators or individuals. The allegation that the suit is for the use of the canal fund, does not impart to the suit any new vigor. The canal fund is neither a natural body nor a body politic. Can a mere ideal thing be a *cestui que* use? The contract in question is neither within the express powers conferred upon the fund commissioners, nor the general scope of their authority. But the legislature has not left the question to conjecture. Section 10 of the act referred to, 23 Ohio L. 57, imposes the duty of soliciting, and the power of receiving donations, upon an entirely different board, the canal commissioners. This power, so expressly conferred upon 63] other agents, can not be taken, by implication, *as conferred upon the fund commissioners. The case of Hardin v. Trustees of New Haven, 3 Ohio, 227, is confidently relied upon by the plaintiffs. That was a suit brought by F., B., and P., trustees of New Haven township, upon a township liability. The court say, page 229: "Statutes creating corporations, usually give them corporate names, and authorize them to sue and be sued by the name given." The act incorporating townships declared them bodies corporate and politic, capable of suing and being sued, but it does not give them corporate means, nor direct by what name suits shall be carried on, for or against them. The act for the relief of the poor gives the charge of paupers to the overseers of the poor, at the expense of the township, and the trustees are empowered to prosecute the necessary action against the trustees of any other township, etc. In this law the phrases, "the township, the overseers of the township, and the trustees of the township," seem to be promiscuously

used as synonymous expressions. The court adjudged that the suit must be against the corporation, and from the whole statute, as the affairs of the township were principally managed by trustees, there was no impropriety in suing the corporation in the name of the trustees of the township, or in rejecting the names of F., B., and P. as surplusage, it being evidently the intention to sue the township. Our opinion does not conflict with this decision. There was a corporation expressly vested with power to sue, and the only difficulty was in ascertaining the corporate name. The court held one of those used in the act sufficient, if it showed clearly the suit to be against the corporation. Nor do we interfere with that class of cases where church wardens, school directors, etc., have been holden to possess the right to sue. "There are many instances in the case of collective bodies of men, coming under one general description, endowed with a corporate capacity, in some particulars expressed, but who have, in no other respect, the capacities incident to a corporation," and "where a public office is instituted by the legislature, an implied authority is conferred on the officer, to bring all suits, as incident to his office, which the proper and faithful discharge of his duties require." 18 Johns. 418. This implied corporate power *to sue, if it may be so described, [64 arises from necessity, when, without a resort to it, there would be a failure of justice, or an inability to attain the end aimed at, in conferring powers on the agent or officer; and in most, if not all these cases, the body or community, for whom the agent or officer acts, is incapable, in law, of maintaining a suit. A majority of the court is of opinion, that the fund commissioners are not a corporation for the purpose of sustaining this suit, and that the objection, under the pleadings in this cause may be made now.

It does not follow from this decision, as counsel seem to fear, that the defendant, and all others contracting with the fund commissioners, or the canal commissioners, are altogether exonerated and discharged from their contracts. This suit fails for want of proper parties. Cases are numerous, and of every day's occurrence, where public officers and agents of corporations make contracts in their own names, which accrue to the benefit of their principals. The affairs of our banking institutions are managed by boards of directors; yet it would hardly be contended that the board, as directors, could sue, upon a contract made with it to pay money to the cashier, or to themselves; or that the cashier could bring such

suit. Such a contract would be held the contract of the bank, who alone could sue upon it. Macbeth *v.* Hardimand, 1 Term, 172; Unwin *v.* Wolsely, 1 Term, 674, and Hodgson *v.* Dexter, 1 Cranch, 345, are strong cases of engagements by public agents, nominally in their own names, held to be public contracts. The last was a suit upon a lease for a house, between the plaintiff and Dexter, secretary of war, in which he covenanted for himself, and his successors, and was executed with his signature and seal. Chief Justice Marshall, in giving the opinion of the court (page 263), says: "It is too clear to be controverted, that when a public agent acts in the line of his duty, and by legal authority, his contracts, made on account of the government, are public, and not personal. They accrue to the benefit of, and are obligatory on the government, not the officer." "The court is unanimously, and clearly of opinion, that this contract was entered into entirely on behalf of the gov-
65] ernment, by a person properly authorized to *make it, and that its obligation is on the government only." By the act of assembly referred to, empowering the canal commissioners to receive donations, etc., they are expressly required to be in behalf of the state, or to the state. The promise in the subscription paper was to the same effect as if it were a promise to pay into the state treasury. It is to pay to the canal fund commissioners, for the use of the fund. This fund they are intrusted with, as the treasurer is with the general funds of the state. The designation of the fund commissioners is but the designation of the agent to receive the money. The expression does not seem to have been used to discribe the obligee of the contract. We are unanimously of opinion, that suits on this and other like contracts, and on contracts with the canal commissioners, may, and should be brought in the name of the state, in whose behalf, and on whose account they were made. 2 Kent's Com. 492; 2 Esp. 567; 5 Mass. 491; 10 Mass. 327; 15 Johns. 1; 1 Green, 162.

A new trial must be granted, the costs to abide the event of the suit; but we advise the plaintiff to submit to a nonsuit. A nonsuit was entered.

Judge COLLET dissented from the court as to the corporate powers of the fund commissioners, and the right of the defendant to object to their want of power, after pleading to the suits.

SMITH ALLEN AND JAMES YOUNG *v.* JACOB LITTLE.

Under the statute of Ohio, a married woman can make a will devising real estate held in her own right.

THIS cause came before this court, by adjournment from the county of Licking.

It was an action of trespass, *quare clausum fregit*, and was submitted to the court upon an agreed statement of facts. The facts were these: Benjamin Pegg and Catharine Hull were lawfully joined in marriage, in the year 1780, and lived together in Pennsylvania, until they had eight children. *In the year 1800, they sep- [66 arated by articles of agreement, and continued to live separate and apart until the death of the said Catherine. Soon after the separation, the said Catherine removed to the State of Ohio, and purchased the lot upon which the trespass is alleged to have been committed. In the year 1814 she made her will, devising the same lot to one Mary Ann Pegg, and soon after died. The will of Catherine Pegg was made without the assent of her husband, and he is still living.

In the year 1830, Mary Ann Pegg devised the same land to a stranger, under whom the plaintiff claims, and died. The agreement concludes as follows: "And it is agreed, that if the said Catherine, while a *feme covert*, as aforesaid, could make a valid will of said lot, then the plaintiffs are entitled to recover; if she could not, then judgment to be entered for the defendant." The only question made was, whether under the laws of Ohio, in force in 1814, a *feme covert* could make a valid will or devise of land, and the decision of that question was adjourned here.

EWING, DILLE and HUNTER, for the plaintiffs, contended:

That whatever may have been the decisions in England, under the statute of wills, or the decisions of the courts of the different states in the Union, under the statutes of those states, the intention of the legislature of Ohio is clearly manifest in the act of February 18, 1808, for "proving and recording wills," etc., to empower a *feme covert* to dispose of her real estate by will. That the same principle has continued to pervade the legislation of the state upon the same subject, until the present time, and that the court are bound

to carry this intention into effect. They further contended that even should it be doubtful, whether, where the wife was living with the husband, she could make a will, still that it might be done, when she was living separate and apart.

SEARLE and STETSON, for defendant, contended:

That the several statutes of Ohio are not materially variant from 67] the statute 32 Henry VIII., commonly called the *statute of wills, and that, under that statute, it was held that a married woman could not make a valid will. They cited 1 Powell on Dev. 140; Dyer, 354; 12 Mass. 525; Kirb. 194; 2 Day, 63; 10 Serg. & R. 445.

Opinion of the court, by Judge HITCHCOCK:

At common law, real estate could not pass by will. By the statute 32 Henry VIII., cap. 1, it is enacted, "that all and every person or persons having, or which shall hereafter have, any manors, lands, tenements, or hereditaments, holden in socage, or in the nature of socage tenures, shall have power to give, dispose of, will, and devise the same, by his last will and testament." This statute contains no clause of restriction as to the person who might devise. It is general in its terms—"all and every person or persons." In giving a construction to it, the courts seem to have been inclined to limit the power of devising to those persons who, by the principles of the common law, were enabled to bind themselves by contract. That doubts existed as to the propriety of this construction, is apparent from the fact that at the very next session of Parliament it was deemed necessary to pass an explanatory act. Section 14 of the 34 and 35 Henry VIII., cap. 5, enacts, "that no wills or testaments made of any manors, lands, tenements, or hereditaments, by any woman *covert*, or person within the age of twenty-one years, or by idiots, or by any person of non-sane memory, shall be taken to be good and effectual in law."

These statutes being the first made in England, upon the subject of devising real estate, all the decisions which have been made by English courts have been made with reference to them. It is not singular that those decisions should be uniform, denying this right to *femes covert*. The statutes prohibit such persons from devising, and the courts would not incline to establish a principle contrary to both the spirit and the letter of the law. English cases can be of no authority here, unless it first be shown

that the statutes under which those cases were first decided are similar to our own. It can not, however, be matter of surprise that, among the profession, the opinion should prevail that even in our state *a *feme covert* can not make a will. We get [68 our ideas from reading English law books, and the books of reports published in our sister states; and without stopping to inquire what change has been made by our own local legislation, we adopt as sound law the principles there advanced.

Counsel for defendant say it is holden in New York, Massachusetts, and other states that married women can not dispose of real estate by will. We are aware that such is the law in some of the states, although not in all. But before we can receive the cases cited as authority, we must see the statutes by which the courts were governed. If those statutes are similar to our own, then the cases decided will be entitled to great consideration.

The case of Osgood v. Breed, 12 Mass. 525, is much relied on by the defendant's counsel. In that case the Supreme Court of Massachusetts decided that the will of a married woman is void. They say, "The power of devising is given to every person lawfully seized of any lands, etc., in his or her own right. But a married woman is not so seized. She and her husband are jointly seized in her right." The peculiar phraseology of the statute is relied upon by the court as the reason why a married woman may not devise. But the phraseology of our statute is materially different. By the act of February 10, 1810, 8 Ohio Stat. 146, the testator is authorized "to devise all the estate, right, title, interest in possession, reversion, or remainder which he or she hath, or at the time of his or her death shall have, in or to lands, tenements, etc." This was the statute in force at the time Catherine Pegg made her will, and at the time of her decease. No one will deny that a married woman hath an interest in her own land. There being then this difference between the statute of Massachusetts and that of Ohio, the case of Osgood v. Breed can have but little influence in giving a construction to the statute of the latter state.

In the case of West v. West, 10 Serg. & Rawle, it is decided by the Supreme Court of Pennsylvania that a *feme covert* can not dispose of her lands by will; and in deciding the case, that court express surprise that any person should ever have thought otherwise. It may be a matter of surprise *if we look to the [69

statute of Pennsylvania, but no one will doubt the power of the legislature of that or any other independent state to confer such privilege upon a married woman. The first statute in the Northwestern territory on the subject of wills was adopted from Pennsylvania, and took effect October 1, 1795. Ohio L. L. 457. It is presumed that this was the statute under which the case of West *v.* West, before referred to, was determined; and if there had been no change in the law by subsequent legislation, that case would be one in point, and by the authority of which we should feel ourselves bound.

Having made these preliminary remarks, let us now examine the local legislation of Ohio, and ascertain whether it has been such as to make any innovation upon the statutes of England, or of our sister states. And if, upon such examination, it shall be found that a fair construction of the legislative acts leads to the conclusion that our own legislature have intended to confer the power upon *femes covert* of devising real estate, it is not for the court to thwart or disappoint that intention. It is our duty to declare, not to make the law.

The ordinance for the government of the territory of the United States, northwest of the river Ohio, Land Laws of Ohio, 252, contains, among others, the following provision: "And until the governor and judges shall adopt laws as herein mentioned, estates in the said territory may be devised or bequeathed by wills, in writing, signed and sealed by him or her, in whom the estate may be (being of full age), and attested by three witnesses." This ordinance was passed by Congress, on July 13, 1787, and has ever been considered the fundamental law of Ohio, until the adoption of the state constitution. No law upon the subject of wills was adopted by the governor and judges until 1795; of course, until that time, the before-mentioned clause in the ordinance was the law. It will be perceived that there is no restriction as to the right of devising, except that the devisor shall be "of full age." Whether it ever became necessary for the territorial courts to give a construction to this provision we know not. Had it been necessary, however, it is but reasonable to suppose that it would have 70] been held, that it did not *confer the power upon a married woman to make a will. Such decision would have been in conformity with the decision of the courts, and this court would hold the same, upon the same general expressions.

On June 19, 1795, the governor and judges adopted from Pennsylvania "a law concerning the probate of wills written and nuncupative," which took effect October 1st, of the same year. This law, however, did not vary from the ordinance as to those persons who should have power to make wills. It is the only statute upon the subject, previous to the adoption of the constitution, and is probably similar to the statute of Pennsylvania, under which the case of West v. West, was decided. It continued in force until June 1, 1805.

Since the organization of the state government, this subject has been frequently before the legislature. In the short space of twenty-six years, no less than six general laws, besides a great number of amendatory and supplementary acts have been passed, directing the manner of executing, proving, and recording wills and codicils.

The first of these was passed on January 5, 1805, to take effect the first day of June then next following. 3 Ohio L. 173. This statute is similar in its general features to that of 1795, and makes no change in the descriptions of persons who may devise.

On February 18, 1808, another law was enacted to take effect on the first day of June of that year. 6 Ohio L. 75. The first section points out who may make a will. It enacts as follows: "Every male person aged twenty-one years or upward, and every female person aged eighteen years and upward, being of sound mind, shall have power, at his or her will or pleasure, by last will and testament, in writing, to devise all the estates, right, title, and interest in possession, reversion, or remainder, which he or she hath, or at the time of his or her death shall have, of, in, or to lands, tenements, hereditaments," etc. Upon these general words and expressions there is no restraining clause, nothing from which we can infer that the legislature intended anything more or less than is expressed. Now I would ask what is meant by the phrase "every female person of the age of eighteen years *and upward." I do not ask those alone, who have derived their ideas of the propriety of any law by reading English books, or who would enlarge or restrain a statute of Ohio, so as to make it compare with a statute upon the same subject, although with different phraseology, enacted in New England, New York, Massachusetts, Pennsylvania, or any other state in the Union; but I ask any man of ordinary common sense, who desires to arrive at a correct understanding [71

of a statute, by giving to the words used by the legislature their ordinary and appropriate meaning. The law is made, not for the benefit of this or that profession, or class of men, but for the community at large; and every statute should receive such construction as is consistent with the common sense of that community. What, then, is the meaning of the words "every female person?" Is not a married woman a person? She is, so far that she may be punished for her criminal acts, and why may she not be, so far as to make a will? She labors, it is true, under many disabilities, but it is within the power of the legislature to remove those disabilities, and when this power is exercised, it is not the province of this court to correct the procedure. If a married woman is a "female person," she is authorized by the act of 1808 to make a will, and that she is thus authorized, seems to be clear beyond a doubt, to a majority of the court.

It has been argued by the counsel for the defendant, that to give this construction to the statute would be fraught with danger. We are aware of the disabilities under which a married woman labors at common law. We are aware that to some intents she is esteemed as dead in law; that her contracts are not obligatory upon her; that she is not answerable even for crimes committed in the company of her husband. Still, notwithstanding all these disabilities, she may, even in England, convey her lands by fine, and in our own state by deed, if executed by and with her husband. And we do not readily perceive that there is any more danger to be apprehended from permitting a *feme covert* to transfer her land by will, than there is in empowering her to convey by deed.

The act of February 10, 1810, was the law in force at the time 72] when Catherine Pegg made her will. 8 Ohio L. *146. The first section of this act is the same with the first section of the act of 1808. A majority of the court are of the opinion that at the death of Catherine Pegg, the lot of land in controversy, passed by the will of the said Catherine to Mary Ann Pegg, and that the law arising upon the agreed statement of facts is with the plaintiffs.

Whether Benjamin Pegg could have his courtesy in the premises we do not now undertake to decide, that question not being made upon the question presented. Nor does the circumstance that the wife was living, separate and apart from her husband,

have any influence with the court. We go upon the ground that, by the statutes of February 10, 1810, a married woman had an unquestionable right to make a will.

Judge COLLET dissented.

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JAMES HALL, ADMINISTRATOR OF ABEL JEWETT, SEN., DECEASED, *v.* ELI PRATT AND SUSANNAH, HIS WIFE, ADMINISTRATOR AND ADMINISTRATRIX OF ABEL JEWETT, JR., DECEASED.

Where a creditor is appointed administrator to his debtor, and dies without receiving assets, it is not to be assumed that the debt was paid, nor is it extinguished.

THIS cause was reserved for decision here, in the county of Licking.

It was an action of *assumpsit*, upon promises between the respective intestates. The first cause is upon a note for thirty-five dollars, in grain or pork, given by the intestate of the defendants to the intestate of the plaintiff. The second count is upon a similar note for twenty dollars. The third is the common counts for work and labor, money paid, had, and received, goods sold and delivered, etc.

The defendants pleaded the general issue, and gave notice of set-off; and also, that after the decease of the said Abel Jewett, jr., the said Abel Jewett, sen., became co-administrator of his estate, with the said Susannah Pratt, and as *such administrator, he [73 received divers large sums of money, out of which he retained whatever was then due and owing to him, the said Abel Jewett, sen.

Upon the trial, the plaintiff offered the notes specified in the first and second counts to the jury. It was admitted that after the death of Abel Jewett, jr., Abel Jewett, sen. (the payee), together with said Susannah Pratt, administered upon his estate, gave bond, and took the usual oath. There was no evidence that Abel Jewett, sen., did any other act as administrator. He afterward died. The said Susannah subsequently married the said Eli Pratt, and at the March term, 1826, she, in conjunction with her husband, settled the accounts of the estate of said Abel Jew-

ett, jr. The accounts were also produced. They were made out under the following caption: "Dr. Susannah Pratt (late Susannah Jewett), administratrix of the estates of Abel Jewett, jr., in account current with said estate. Cr."

In this account she charges herself with the amount of the assets, which came to her hands—seven hundred and seventy-six dollars and twenty-six cents. She credits herself with money paid out—five hundred and twenty-three dollars and sixty cents—and gives the items of payments, from which it appears that nothing was ever appropriated, paid, or retained on account of the two notes; leaving a balance in her hands of assets of the estate amounting to two hundred and fifty-three dollars and sixty-six cents.

In this state of the testimony, counsel for defendants objected to the admissibility of the notes, which objection was sustained by the court, and judgment rendered against the plaintiff, to reverse which, this writ of error is brought.

H. STANBERY, for plaintiff in error:

The ground taken by the court below, and now relied upon by the defendants' counsel, in support of this decision, is this: That when Abel Jewett, sen., the creditor, became administrator to Abel Jewett, jr., the debtor, the right of action was suspended, and being once suspended, it could never be revived.

74] *The case of Bigelow v. Bigelow, 4 Ohio, 147, was supposed by the counsel to settle this case; for, although not analogous in circumstances, it was said that the principle there established embraced it.

In the case referred to, the debtor had administered to the creditor. The court held the consequence to be, that the administrator and his sureties should be fixed with the amount of the debts or assets; and that no action could afterward be maintained against the administrator for the debt as it originally stood.

It is admitted, however, that the court do say, a personal action once suspended, is always suspended; and that this principle is there laid down without qualification. The authorities referred to by the court are Cro. Car. 372, and 1 Com. Dig. 337.

The case in Cro. Car. is Dorchester v. Will; and the facts are these: There were two obligors in a joint and several bond. One of the obligors died and made A. his executor. The obligee afterward died and also made A. his executor. A., as executor of the obligee, brought debt on the bond against the surviving obligor.

The defendant pleaded these facts; and that assets of the deceased obligor had come to the hands of A., sufficient to pay this debt. A. replied, that neither at the death of the obligee, nor at any time afterward, had any goods of the deceased obligor come to his hands. The defendant demurred. The court overruled the demurrer, and held that the action was maintained. In their opinion, the court put a number of cases, and among others the following: "When the debtee makes the debtor his executor, it is not absolutely a discharge of the debt, for the debt remains as assets in the hands of the debtor executor; and it is *quasi* a release in law, because he can not be sued; but it is a mere suspension of the action; when a *feme* debtee takes the debtor to husband; or if a man debtee takes the debtor to wife, that is a release in law, because they may not be sued, and personal actions once suspended, are perpetually suspended. But when the executor of the debtor is made executor of the debtee, he has nothing thereby in his own rights, but it is only to sue an action in the right of another." None of these cases resemble *the case at bar, in which the debtee administers to the [75 debtor; but it is claimed that they establish a principle within the operation of which the case at bar must come. And that principle is, that when a right of action is so circumstanced as to be temporarily suspended, it is not merely suspended, but is absolutely extinguished.

Now, as a general proposition, embracing all cases, and especially as applicable to this case, I deny this consequence of the suspension of a right of action. I am prepared to suggest to the court a variety of cases, in which there is this temporary suspension, and yet no extinguishment; and to show that in every case where a total extinguishment has been holden to be a consequence of suspension, this intendment has been made upon some sensible ground, to advance justice and to prevent the delay or destruction of rights. Indeed, this is the uniform character of all legal fictions.

The cases put in Dorchester *v.* Webb, above cited, are in conformity with these views. "1. If the debtee makes the debtor his executor, it is not a discharge of the debt, for the debt remains as assets, in the hands of the debtor executor, and is *quasi* a release at law, because he can not be sued," etc. Here this intendment does not violate common sense and useful reason. Inasmuch as the debt can not be enforced by suit it is right that it should be

reached in some way, and therefore, the law presumes that the individual debtor has paid to himself as administrator the amount of the debt for the use of the estate.

"2. But it is a mere suspension of the action where a *feme* debtee takes the debtor to husband." It is difficult to understand what consequence, as to the action, the court intend, under these circumstances. The case of debtor executor is holden to be a release or extinguishment of the action; this case of *feme* debtee immediately follows, and is so put as to seem to be contradistinguished from the other. "But it is mere suspension of the right of action, etc.;" that is, not a release or final discharge. If this be the true construction, then this case is one, where a mere suspension works no extinguishment of the right of action. But if the case do not warrant this construction, and is taken to fall within 76] the rule of extinguishment, there is no reason for it. *It is not the case of a fictitious union of creditor or debtor in an executor or administrator (which alter no liabilities), but of their actual legal union in marriage, which operates an entire transmutation of precedent rights and liabilities. By the marriage the husband becomes entitled to the *choses* of the wife upon reducing them to possession. As debtor, he is already in possession of the debt, which is the *chose*, and *rei instanti*, upon the marriage, it becomes his own and is extinguished.

"3. Or if a man debtee takes the debtor to wife, that is a release in law, because they may not be sued, and personal actions once suspended are always suspended." In this case no one can doubt that the marriage operates as a discharge of the debt, for the plain reason that the debt due from the *feme*, upon her coverture, becomes the debt of her husband, and therefore, the remedy, by action, expires with the debt itself. Why resort to the fictitious and nonsensical reason of the text, when the true reason is obvious and sensible.

The only other book referred to by the court, in Bigelow v. Bigelow, is 1 Comyn's Digest, 337. "If an executor, who was indebted to a testator dies, an action does not lie against his executor or administrator for the debt; for a personal thing suspended is extinct." Off. Ex'rs. 45 is cited in the margin. If this passage is understood to mean that under such circumstances the debt is extinguished, and no action lies against the debtor or his representatives, then it is not now the law. An action does lie against the

debtor or his representatives, and even against his sureties to recover the full amount of the debt. *Vide* Bigelow *v.* Bigelow, *ut supra*. But if it is taken to imply that no action afterward lies to recover the identical debt as it stood before the death of the creditor, then the true reason is, that the right of action for the debt is gone, not because of its suspension, but because the law presumes the debt to be paid and changed into assets, for the recovery of which a different right of action is substituted.

I pass to other cases illustrative of the operation of this principle of suspension.

"The case upon a special verdict was: a woman executrix marrieth with a debtor of the testator, the husband dieth and *debt [77 was brought against the woman, who pleaded *riens inter mones*, and all this was found; and if this was assets, was the question. And it was adjudged that this was not assets in her hands, for by the intermarriage, the debt which the executrix had *in auter droit*, was not extinct, but suspended, and the action was revived against the executor of the baron." Crossman *v.* Reade, Cro. Eliz. 114. Here was a case of temporary suspension of the right of action, and according to the unqualified rule in cases of suspension contended for, the right of action was extinct. In this instance such a consequence would have worked a manifest injury to the estate of the deceased creditor of the *feme*, as she would then have been liable to the amount of the debt as assets, when by the finding of the jury she had never received one cent of it. The rule was, therefore, held not to apply; and the decision of the court leads to this result: that as there is no reason in the rule, there must be some reason out of it to authorize its application.

In Co. Lit., title Releases, 264, B. it is said, "If a *feme* executrix take the debtor to husband, this is no release in law, for that should be a wrong to the dead, and in law work a *devastavit*, which an act in law should never work; and so it was adjudged in the King's Bench." Mich. 30 and 31 Eliz.

In the case of Wankford *v.* Wankford, Salk. 300, the question arising in the case at bar is very fully considered in all its aspects.

It is said, by Powell, Justice, "There would be a great diversity when the obligee made the obligor his executor and when the obligor made the obligee executor; for, in the last case the debt is not extinct, but only upon supposal that the executor has assets which he may retain to pay himself; for, though the obligee may

give the obligor the debt, yet that will not hold *vice versa*, but in case of failure of assets, the executor may sue the heir. Indeed, where the executor has the assets the debt is gone, but that is because he may retain and pay himself, and so is 12 H. IV., c. 21; Plowd. 185, B. But if he have no assets the act is never so much as suspended, for the executor may sue the heir at the very day; and so it is not within the rule of a personal action once suspended, etc." 78] So, Holt, C. J.: "If the obligor make the obligee or the *executor of the obligee his executor, this alone is no extinguishment, though the same hand is to receive and pay; but if the executor has assets of the obligor it is an extinguishment, because it is within the rule that the person who is to receive the money is the person who is to pay it; but if he have no assets, then he is not the person that ought to pay, though he is the person who is to receive it," etc. "In the cases of Locke and Crosse, where the obligee was made executor to one of the obligors; and in action by him against the other, the matter was pleaded, and the plea was held to be naught, because it was not shown to what value the assets were that he administered. But if the defendant had shown that he administered goods to the value of the debt in demand, it had been a good plea." Hob. 10; Hutt. 138; 2 Lev. 73; 3 Keb. 116, are cited in the margin.

In 3 Bac. Abr. 10, under the title "of making creditors executors," it is said:

"The reason why the debtor's making the creditor his executor, or the creditor's taking out administration (which is precisely our case) is said to suspend or extinguish the action, is on supposition of assets. So, if there are no assets, he may sue the heir of the obligor, where the heir is bound."

Thomas *v.* Thompson, 2 Johns. 471, may be cited and relied on as establishing a different doctrine. It is therefore proper to notice it. A. recovered judgment against B., as administratrix of C., and afterward appointed B. executrix, and died. It was held, that the judgment debt was thereby extinguished. Van Ness, Justice, in delivering the opinion of the court, lays down the rule that a personal action once suspended is always suspended, without exception or qualification. But, in a few paragraphs after, the learned judge refers to the rule laid down by Lord Holt, in Wankford v. Wankford, 1 Salk., *ut sup.*, to determine when a suspension of the remedy works an extinguishment; and according

to that rule, he decides that as the executrix, in the case before him, had assets in her hands as administratrix, the debt was, for that reason extinguished, as the same hand was to pay and receive.

The principle deducible from the foregoing cases, in reference to the case at bar, is clearly this: That as Abel Jewett, *sen., never [79 had assets in his hands to satisfy his debts, as there was no retainer by him while his temporary administration continued, and as there has since been no payment of it, by the surviving administratrix, the debt yet survives, and the remedy, by action, survives with it. To hold the contrary, would lead to manifest injustice, and deter any creditor from availing himself of the provisions of our statute giving to him the right of administration upon the estate of his deceased debtor.

It has been shown that the legal fiction of a temporary suspension of the right of action, being an extinguishment, is not of universal application. Other instances than those already before the court suggest themselves.

Between an intestacy, and the granting of administration, there is a total suspension. So in the case of alien enemy, of coverture, and outlawry.

J. DILLE, for defendant in error:

The question arising in this case was so fully settled in the case of Bigelow *v.* Bigelow, 4 Ohio, 147, that it seems hardly necessary to trouble the court with any remarks here. The principle there recognized, that personal actions once suspended are always suspended, establishes as complete a bar in this as it did in that case, to the plaintiff's recovery. That principle is so settled by authority that the court will pause long before it sets it aside and exposes us to greater injustice, resulting from the want of such a rule. Because a rule may, in an individual case, work injustice, is no good ground for setting it aside; for every rule of law may have this effect. We find this principle recognized on broader grounds in Noy's Maxims, 2d Am. ed. from 9th London ed. 33, Max.

The law considers that a creditor places himself in a better situation by becoming administrator to his debtor, for he thereby may retain his debt out of the assets which come to his hands. If he does not do it, it is his own fault, and there are no other means known to the law whereby he may recover such debt.

When he becomes administrator, the contract, *eo instanti*, is

80] *extinguished, for it loses one of its essential requisites—parties. Yet no injustice is done, for he may retain. Such is the rule of law in all cases of this kind. If a woman marry with her obligor, the debt is extinct, and she shall never have any action if another be bound with him, for by the marriage the action is suspended, and an action personally suspended against one is a discharge to all.", Noy's Max. 83. But suppose this rule should not apply here. The fact that Abel Jewett, sen., became administrator to Abel Jewett, jr., is *prima facie* proof that assets came to his hands, and that he retained his debt. If retained, the notes upon which this suit was brought, were paid and satisfied, and can be no longer the subject of an action. To rebut the effect of this proof, the settlement of Susannah Pratt, the co-administratrix, is offered in evidence, wherein, among the items of payment, nothing appears to have been paid or retained on account of those notes. This proves nothing. Susannah Pratt was obliged to account for nothing but the assets which came to her hands. If money or property was received by Abel Jewett and wasted, she is not liable for it, but is bound only to account for the assets which came to her hands. 2 Bac. Abr. 295, tit. Ex'rs and Adm'rs, letter D, 2. Indeed, in that account, she only professes to account for what she received, for the court will perceive from the bill of exceptions, that her account is under the following caption: "Dr. Susannah Pratt (late Susannah Jewett), administratrix of the estate of Abel Jewett, jr., deceased, in account current with said estate." This account, then, proves nothing in favor of the plaintiff. There is no fact in the whole bill of exceptions to show that this is a hard case, requiring an exemption from the rule. But, on the other hand, reverse this established rule of law, and you will place every case of this kind in a labyrinth of difficulty. As for instance, A. dies indebted to B., who administers; after some time B. dies, and C. administers upon his estate, and D. takes letters of administration, *de bonis non*, of the estate of A. C., as B.'s administrator, brings suit against D., administrator of A. As the law now stands, he can not; but reverse the rule, and in order to establish his defense, you will compel D. to prove that which is 81] impossible: the secret retainer by *B. of his debt out of the assets which came to his hands. There may be the specious appearance of justice in this practice, but it requires but little reflection to perceive that it will open wide the door to injustice.

The rules of law are general in their nature, and there is no one of them that may not, in some particular cases, operate hard; yet the hardship must be borne with, and he who suffers must console himself that it is for the public good.

It was not incumbent on us to prove that assets came to his hands. That is presumed from the fact that he was legally qualified to receive, take, and hold them. That presumption might have been rebutted by proof that he died immediately after he was qualified. But no such proof was offered. He might have lived years after he became administrator. There is no fact that takes this case out of the rule, and let the law prevail.

Opinion of the court, by Judge WRIGHT:

The plaintiff intestate was the promisee of the notes on which the suit is brought, which were given by the defendants' intestate. The promisee, in his lifetime, was appointed administrator to his promisor, but never received any assets, and the main question presented is, whether the mere appointment of a debtee administrator of his debtor's estate, extinguishes the debt.

The granting administration of an estate to one indebted to the intestate, is an extinguishment of the debt. The *chose in action* becomes converted into a *chose in possession*, and is transmitted, by the mere operation of law, which is equivalent to judgment and execution. The debt is thus satisfied and extinguished. The instant administration is granted, the administrator being the person to pay and to receive, is considered as having paid the debt, and as holding the amount in his hands as assets; and the debt having once become assets, no act of the parties can return them back to an obligation. Bigelow *v.* Bigelow, 4 Ohio, 147; Gordon on Decedents, 153, 159; Toll. Ev. 238; 1 Com. Dig. 135, 136; Dorchester *v.* Webb, Cro. C. 372; Wankford *v.* Wankford, 1 Salk. 302, *305; Winship *v.* Ross, 12 Mass. 199; Hayes *v.* Jackson, 6 [82 Mass. 149; Stevens *v.* Gaylord, 1 Mass. 256; Woodward *v.* Lord Darcy, 1 Plowd. 184–186; 1 Sid. 79. The case of Bigelow *v.* Bigelow, which is solely relied upon by defendant's counsel, is one of this class of cases. In that case the defendants' intestate had been appointed administrator to his creditor, and it was held that the debt due by him, having become assets in his hands, no action could be maintained upon the original debt against him. The principle of this decision is sensible, and is founded in justice. It

does not release the debt without payment, but charges the person bound to pay the money, directly with it, as assets.

The case at bar is entirely different. Here the creditor, not the debtor, is appointed administrator. In such cases the grant of administration may, or may not, according to circumstances, extinguish the debt. The rule is different, but like that applicable to the other class of cases, it looks to the same end, the attainment of justice by direct means. It is that the administrator has a right to retain what is due to himself out of the assets in his hands to be administered, because he can not sue himself. Gordon on Decedents, 179; 2 Black. Com. 571; 3 Black. Com. 18, 19. If, under such circumstances, he could sue himself, it would avail nothing, for the mere operation of law, in this, as in the other class of cases, is equivalent to judgment and execution. It must be obvious that the right to retain supposes the possession of assets out of which the debt may be retained. Without chattels of the decedent the right in the administrator would be naked and fruitless; in such cases it is laid down that the appointment of one administrator to his creditor is not an extinguishment, unless he has in his hands sufficient to satisfy the debt; and if the goods he has are insufficient, or he has none, he may immediately sue the heir. Gordon on Decedents, 185. In the case at bar it is admitted that no assets whatever came to the hands of the administrator. There could not, therefore, be an extinguishment of the debt, arising either from supposed satisfaction or from mere operation of law.

The counsel for the defendants rests his defense upon the expression of the court in the case of Bigelow *v.* Bigelow, 4 Ohio, 83] 147, that "personal actions once suspended are *always suspended. Cro. Car. 372." And the remark of the court that "Chief Baron Comyn, who is himself said to be authority, has recognized the principle as a sound one, that a personal thing suspended is extinct. 1 Com. Dig. 337." The case referred to in Cro. Car. is Dorchester *v.* Webb; there one of two obligors had died and made A. his executor; the obligee died afterward and A. was his executor also. A., as the executor of the obligee, and the surviving obligor, pleaded that assets of the deceased obligor had come to A.'s hands sufficient to pay the debt. To which it was replied that no goods of the obligor ever came to his hands. Upon demurrer, which admitted the truth of the replication, the

court held the action maintainable, and agreed "that when the debtee makes the debtor his executor, it is not absolutely a discharge of the debt," for the debt remains as assets, and is *quasi* a release in law, because he can not be sued; but it is a mere suspension of the action where a *feme* debtee marries the debtor; though "if a man debtee takes the debtor to wife, that is a release in law, because they may not be sued, and personal actions once suspended are perpetually suspended!" The decision of the case reported is right, but the careless report of the language of the court occasions the difficulty. The first proposition of the court I have shown by abundance of authority, and the reason of the thing is correct; the second rests, palpably, on a similar principle. By the intermarriage, if the woman be the debtor, the debt becomes, by operation of law, the debt of the husband, and so is extinguished, and the remedy is gone; so the law gives the husband the *choses in action* of the wife when reduced to possession, and if he himself be the debtor he is already in possession of the debt, and *eo instanti*, upon the marriage it becomes his own, and is therefore extinguished. These are cases of extinguishment and not of suspension. And the very case in which the court are made to say, "personal actions once suspended are perpetually suspended," was one of temporary suspension, so declared to be, and for that reason was sustained by the court. The passage in Com. Dig. 337, is this: "If an executor, who was indebted to the estate dies, an action does not lie against his executor or admintrator for the debt; for a personal thing suspended is *ex- [84 tinct." In Crossman *v.* Reed, Cro. Eliz. 114, a woman executrix had married a debtor of her testator; the husband died, and debt was brought against the woman. She plead *riens inter manes*, which was found, and whether this was assets was the question. The case was adjudged for the defendant that this was not assets, because the debt held by her, as executrix, was in *auter droit*, and therefore was not extinguished by her marriage, but only suspended; and the right of action was revived against the executors of the husband.

In Wankford *v.* Wankford, 1 Salk. 302, Justice Powell asserts that where the obligor makes the obligee his executor, the debt is extinct "only upon the supposal that the executor has assets which he may retain to pay himself; for though the obligee may give the obligor the debt, yet that will not hold *vice versa*. But in case

of failure of assets, the executor may sue the heir. Indeed, where the executor has the assets, the debt is gone; but that is because he may retain and pay himself, and so is 12 H. IV., c. 21; 1 Plowd. 185, B; but if he has no assets, the action is never so much as suspended, for the executor may sue the heir at the very day, and so it is not within the rule of personal actions once suspended," etc. And Holt, Chief Justice, 1 Salk. 305, says, "If the obligor make the obligee, or the executor of the obligee his executor, this done is no extinguishment, though the same hand is to receive and pay. But if the executor has assets of the obligor, it is an extinguishment, because it is within the rule that the person, who is to receive the money, is the person who is to pay it; but if he have no assets, then he is not the person that ought to pay, though he is the person who is to receive it," etc. He says also, "the same point was again resolved (Hill, 24, 25, Car. 2 B. R.) in the case of Locke *v.* Crosse, where the obligee was made executor to one of the obligors; and in an action by him against the other, where the matter was pleaded, the plea was held to be naught, because he did not show to what value the assets were that he administered; but if the defendant had shown that he had administered goods to the value of the debt in demand, it had been a good plea. Secondly. Suppose the obligor takes administration 85] to the *obligee in that case, the same person has a right to receive the money and to pay it, yet that will be no extinguishment. And so is Sir John Needham's case, 8 Coke, 136. In 1 Bac. Ab., title Executors and Admr's, A. 10, p. 37, it is laid down "that if a person dies intestate, and the ordinary commits administration to a debtor, the debt is not thereby extinguished. Off. Ex. 31. And, therefore, if an obligor administer to the obligee, and makes his executor and dies, the creditor of the obligee may well bring an action against him." Sid. 79.

Upon similar principles, it was adjudged in the King's Bench (30 and 31 of Eliz.), that "if a *feme* executrix take the debtor to husband, this is no release in law, for that would be a wrong to the dead, and in law work a *devastavit*, which an act in law shall never work." Co. Lit., Releases, 264, B. Judge Van Ness, in Thomas *v.* Thompson, 2 Johns. 471, lays down the rule, "that a personal action once suspended by the voluntary act of the party entitled to it, is forever gone and discharged." In that case A. had recovered judgment against B., as administratrix of C., and

afterward appointed B. executrix, and died. The judge says (p. 474), "Here the defendant as executrix of the judgment creditor, Alexander Thompson, had a right to receive the amount due on the judgment, and having assets, as administratrix of the judgment debtor, she ought to pay. The judgment, consequently, by her appointment as executrix (the will having been proven), is extinguished." In this case the judge, after laying down the position (with the qualification of the voluntary act of the party), that a personal action once suspended is forever gone, it will be seen decided, and decided correctly, that the extinguishment resulted, not from the fact of administration, but from the receipt of assets, which she ought to pay. It seems to us to follow, from the authorities, and from right reason, that as the plaintiffs' intestate, in the case at bar, never had any assets of his debtor in his hands, out of which he could retain the debt due to him, the taking of administration by him does not release or extinguish the debt, but that it survives to his representatives. The case of Bigelow v. Bigelow, relied upon, was rightly decided; there the debt became assets, and was extinguished; and we do not understand the court as deciding, in that *cause, for it certainly was not [86 called upon to decide that question, "that in all cases, personal actions, or things once suspended, are always suspended, or extinct." Nor do we so understand the law. It appears, also, in that case (p. 148), that the whole sum due on the covenant, which was the foundation of a suit, had been judicially found to have been all paid before suit brought, so there would be no right in the plaintiff to recover on the covenant. A great variety of cases, of temporary suspension, without extinguishment, will suggest themselves to every professional man, and it is unnecessary to enumerate them.

The difficulty which the counsel supposes would result from holding this debt non-extinguished by the administration without assets is not perceived by us. The decision would not hold the debtor to prove, that which is supposed impossible, the secret retainer of the debt out of assets, but would be satisfied by proof, that the creditor, as administrator, had assets out of which he might have retained the debt.

The court of common pleas, therefore, erred in rejecting the evidence offered, and their judgment must be reversed, and the cause remanded for further proceedings.

M. AND A. ABBOTT, EXECUTORS OF DAVID ABBOTT, DECEASED, *v.* A. COLE AND T. BAKER, ADMINISTRATORS OF L. COLE, DECEASED.

If administrator pay out all the personal estate to one creditor, where the estate is solvent, by selling the realty, and does not apply for such sale, it is a *devastavit*.

Under our law *plene administravit* is an immaterial plea.

THIS cause was certified from the county of Huron, upon division of opinion between the judges holding the Supreme Court of that county.

It was an action of *assumpsit*. Plea, that the defendants had fully administered, and issue. The proof showed that the administrators of Cole had fully administered the personal estate, and were in advance to the estate. It also showed that Cole left a 87] large real estate, which the administrators *had taken no steps to reduce to assets. These questions were made: 1. Whether plaintiff is entitled to judgment. 2. Whether the judgment should be against the goods of the intestate, or against the administrators, personally.

The cause was argued on the circuit by WILLIAMS for plaintiffs, and O. PARISH for defendants.

Judge WRIGHT delivered the opinion of the court:

An administrator can not legally apply all the assets in his hands to be administered, to the full payment of one creditor and the entire exclusion of another. If the estate is insolvent, the law points out the mode of distribution. After the personal expenses and those of the last sickness and of administration are paid, other creditors come in for a *pro rata* distribution. If the estate be solvent, it is the duty of the administrator to convert it into assets, if personal; and in case of a deficiency of personalty, then to proceed to the conversion of so much of the realty into assets as may be necessary to pay the debts and close up the estate. If the estate be insolvent, the administrator pays at his peril; and if he pay any one creditor more than his due proportion of the estate, he does so in his own wrong, and is liable to the unpaid creditor for his contributory share, in the same manner he would if the assets were actually in his hands unadministered. 2 Johns. 475; 1

Saund. 219, 336, n. 7; 3 Sid. 635; 1 Atk. 292. The plaintiffs are therefore entitled to judgment. Indeed, it would seem under our laws that an issue upon the plea of *plene administravit* is an immaterial issue, and might be struck out on motion.

Section 16 of the act of the general assembly, defining the duties of executors, etc., passed February 1, 1824 (see 22 Ohio L. 126), which provision is incorporated into the revised act of March, 1831, section 29, page 353, provides that no administrator "shall be made liable for more than the amount of assets which have come or may come" to his hands, "on account of having failed to plead or make defense, or on account of any plea or pleas" he may *"plead to any suit or action whatever; but the judg- [88 ment of the court, in all such cases, shall be *de bonis testatoris*, and shall only render such administrator liable for the amount of assets in his hands unadministered." It was within the province of the legislature to prescribe the form of judgments against administrators, and their effect. In the act quoted it has done both. The intention of the act is manifest. There is no room left for construction or doubt. We are bound to carry the provisions of this law into execution. The judgment in this case, notwithstanding the plea, must therefore be *de bonis testatoris*. The effect of the judgment is declared by the legislature.

Judge COLLET dissented.

JORDAN, ELLIS & CO. *v.* L. & J. JAMES.

New trial not granted upon account of observations to the jury in the judge's charge, unless such observations were both material and erroneous, if the court are satisfied upon the whole case, that the verdict is right.

Liens of vendors upon goods unpaid for, and *in transitu*.

Factor's liens against their principals.

Consignees' liens.

Carrier's lien.

J. & E. agree in Boston with P. to purchase and ship for P. and upon P.'s notes, goods to J. & E. at Cincinnati, to be sold upon commission. J. & E. negotiate the purchase, ship the goods to New Orleans, charged with the freight, and pay the insurance. At New Orleans the goods are reshipped to J. & E., Cincinnati, who are charged with the frieght from

Boston. On the way, the freighters receive the freight to Louisville from J. & E., and give them a new bill of lading: Held, that J. & E. are in legal possession of the goods, and can retain against P. for their liabilities, as well as their advances.

Held, that the freighter could not rightfully refuse to deliver the goods to J. & E., no change in their circumstances having taken place.

Judgment will not be arrested for a departure in pleading, after issue joined and verdict, if sufficient appears to show for whom judgment should be rendered.

THIS cause was adjourned here for decision from the county of Hamilton. It was an action of *replevin* for taking and detaining one hundred and seventy-five bales of sheetings and eighty-three bales of shirtings. The following pleas were filed to the declaration: 1. Not guilty; 2. *Non ceperunt;* 3. Avowry property in John Clark and Charles Bradley. On all these pleas issue is joined. The fifth avowal sets forth that the property in the goods was in Le Baron Putnam, by whom it was consigned to Caleb D. Jordan, at New Orleans, to be by him forwarded to the plaintiffs, as the commission merchants of Putnam, to sell for and on account of said L. B. Putnam, and that C. D. Jordan shipped said goods on defendant's boat, to be carried to plaintiffs; that Putnam, while the goods were on their way, assigned the goods to Bradley and Clark, for the benefit of his creditors; and that Bradley and Clark, before the goods reached their place of destination, demanded the goods of the defendants, the carriers, and forbid his 89] delivering them to the plaintiffs. *Plea to this avowry: The property was not owned by Le Baron Putnam, nor did they become the property of Bradley and Clark, as in the plea mentioned.

Sixth avowry alleges the joint property to have been in Le Baron Putnam and Edwin Putnam, by whom they were consigned to C. D. Jordan, of New Orleans, to be by him forwarded to the plaintiffs, as factors of L. B. and E. Putnam, as in the preceding avowry, and that Edwin Putnam sold to Le Baron, who transferred to Bradley and Clark. The remainder of this avowry the same as the last.

Plea to this avowry admits that the goods were consigned to C. D. Jordan, yet denies that Edwin Putnam assigned to Le Baron Putnam, and denies that Le Baron Putnam assigned to Bradley and Clark.

2. Plea to all the avowries alleges that on the 9th and 12th of January, 1829, the goods were bought of certain persons by H. Jordan, acting for J. E. & Co., who were the factors and agents of Le Baron Putnam; that the goods, by agreement made by Le Baron Putnam with J. E. & Co., were to be shipped from Boston to Cincinnati, and consigned to J. E. & Co. to sell and account for as the factors and agents of Le B. Putnam; that the goods were purchased with the joint credit of Le B. Putnam and J. E. & Co. as per agreement; that when the purchase was made, J. E. & Co., at request of Putnam, became liable to pay for said goods, by indorsing to the vendors the notes given for the goods. That since said indorsement, they have paid to the vendors a large sum of money, to wit, ten thousand dollars on account thereof; that they assumed upon themselves the payment of the purchase money, by virtue of an agreement between Le Baron Putnam and themselves, that said goods should be consigned to them to sell as factors; that when the goods were purchased, they received the posseesion from the vendors, and have ever since had the entire control of them; nor have they ever been in possession of the Putnams or Bradley and Clark; that they took possession of said goods with the knowledge and consent of the Putnams, for the sole purpose of causing them to be shipped and transported from Boston to Cincinnati, and to be consigned to J. E. & Co. as factors. That on January 14, 1830, *they caused insurance to be made, [90 and the goods to be shipped from Boston to New Orleans; that they paid premium for insurance by a note at six months. They aver that although the goods were shipped from Boston to New Orleans, as alleged in the avowries, yet that C. D. Jordan was their agent as well as the agent for Putnam, and that the defendants, on March 14, 1829, when the goods were shipped on board the steamboat of defendants, they, by the master, signed a bill of lading stipulating to deliver the goods to J. E. & Co. That on April 1, they paid the freight to James, from New Orleans to Louisville, and so they say they have a lien on said goods.

To this plea a general replication is filed concluding to the country.

7. Plea denying the goods to have been the property of the plaintiffs, as in their declaration is alleged.

On this state of the pleading, the cause was tried by a jury before Judges HITCHCOCK and WRIGHT, and a verdict taken for the

plaintiffs. A motion was made by defendants' counsel for a new trial, upon the ground that the court erred in its charge to the jury upon different legal propositions. The motion was adjourned here for decision. The facts of the case, the questions of law involved in them, and the authorities relied upon, are fully noticed in the opinion of the court; it is, therefore, unnecessary to state them here.

For a new trial, Messrs. STORER and FOX, FALES and N. WRIGHT.

Against it, Messrs. CASWELL and STARR, and C. HAMMOND.

Opinion of the court, by Judge WRIGHT:

On the trial of this cause, the following case was clearly made out, in the mass of documentary and oral evidence given to the jury. In January, 1829, Jordan, one of the plaintiffs, commission merchant in Cincinnati, being in Boston, solicited of one L. Putnam, the purchase and consignment to his house, for sale, on commission, a quantity of domestic cottons, when it was agreed, that 91] Jordan should select and *purchase the goods in the name of L. Putnam, to be shipped to Jordan, Ellis & Co., to be sold on the joint account of the said L. Putnam, and his brother Edwin Putnam; and that the proceeds should be remitted to meet or pay the notes given for the goods, and therefore should not be drawn for. Jordan, with some little assistance from E. Putnam, selected the goods, and agreed upon the price and credit, but finding L. Putnam's credit doubted, could not effect the purchase on his notes alone; and, finally, purchased three invoices of goods of different houses, amounting to upward of nine thousand dollars, at eight months, upon L. Putnam's notes, payable to, and indorsed by himself, and indorsed by Jordan, Ellis & Co. The bills were taken and receipted in the name of L. Putnam, who seemed merely passive, by Jordan, who alone was active in the purchase. The bales were marked to J. E. & Co., Cincinnati—were taken by Jordan from the vendors, and shipped to C. D. Jordan, of New Orleans, or to assigns of J. E. & Co., and the bill of lading, dated January 15, 1829, was in the name of L. Putnam. Jordan paid the drayage, and effected insurance upon the shipment, in the name of J. E. & Co. to the amount of nine thousand and five hun-

dred dollars, and paid (by his own note) the premium. The taking possession by Jordan, the shipment, insurance, and the payment by him of the drayage and premium, was with the knowledge and assent of both Putnams, neither of whom ever had actual possession of the goods. With the bill of lading to New Orleans, the following letters of advice were sent by Putnam to C. D. Jordan, and to Jordan, Ellis & Co., by mail:

BOSTON, *January* 15, 1829.

"MR. C. D. JORDAN—*Dear Sir:* Annexed you have a bill of lading for two hundred and fifty-eight bales of domestic goods, which please forward to Jordan, Ellis & Co., of Cincinnati, per first good boat, together with your bill of charges.

"Respectfully yours,

"LE BARON PUTNAM,

"*Per E. Putnam.*"

*" BOSTON, *January* 15, 1829. [92

"MESSRS. JORDAN, ELLIS & CO.—*Gentlemen:* By this day's mail have forwarded you invoice of brown shirtings and sheetings, and below you have my instructions. You will please dispose of the goods on the best terms. I should not advise a speedy sale of them, unless your market will admit of the same. I have bought these goods on eight months' credit, consequently you will have more time to effect sales. Your Mr. Jordan informed me that you could place me in funds to meet my notes for the same; therefore shall not draw on you for the same. He will forward you a statement of the notes given. I am of opinion that brown goods will be higher in this place in course of a month, at least five per cent. As I have bought them on good terms, and freighted them at very low rates, I am in hopes of realizing a profit of ten per cent. I am confident that goods of this kind will go up. If you obtain twelve and a half or thirteen for sheetings, and ten and a half for shirtings, I shall be satisfied. I wish my sales guarantied. Please write me on arrival of goods. You will please cause insurance of this shipment from New Orleans upon nine thousand five hundred dollars, being the amount insured here.

"Yours, etc.

"LE BARON PUTNAM,

"*Per E. Putnam.*"

C. D. Jordan received these goods at New Orleans, paid the freight, and on March 14, 1829, shipped them on board the steamboat Patriot, owned by the defendants, and then commanded by one of them, and received from the captain bills of lading to deliver to J. E. & Co., at Cincinnati, or their assigns, he or they paying freight at sixty-two and a half cents per hundred pounds, or if reshipped, seventy-five cents per hundred pounds, which he testified he did, as agent of J. E. & Co., under their instructions. Shortly after the shipment, and before February 11, 1829, Jordan drew up the following statement in writing and exhibited them to the Putnams for signature, which they refused:

"I, the subscriber, of Boston, State of Massachusetts, have consigned to Jordan, Ellis & Co., of Cincinnati, Ohio, merchandise 93] *to the amount of nine thousand three hundred and six dollars and sixty-nine cents; and for which the said Jordan, Ellis & Co. agree and promise to place me in funds, with the proceeds of the sale, for the payment of the herein described notes, being given by me for the above merchandise consigned them:

January 7, 1829, one note holden by T. Lord & Co., eight months, for	$3,928 17
January 12, 1829, one note holden by P. Blanchard & Co., eight months, for	2,483 02
January 7, 1829, one note holden by G. Richard & Co., eight months, for	2,895 50
	$9,306 69

"I also agree not to draw on the said Jordan, Ellis & Co., as I hold their obligation for the fulfillment of the above agreement. Boston, January 12, 1829."

Jordan at this time offered to give Putnam the following statement to be signed by J. E. & Co., in exchange for the above:

"We, the subscribers, of Cincinnati, Ohio, do hereby agree and promise to place Mr. Le Baron Putnam, of Boston, in funds in season for the payment of the herein-described notes, being given by him for merchandise, consigned us for sale, on his account:

January 9, 1829, one note, eight months, for	$3,928 17
" 12, " " " "	2,483 02
" 7, " " " "	2,895 50
	$9,306 69

"BOSTON, *January* 12, 1829."

Le Baron Putnam failed February 11, 1820, and assigned his effects to Bradley & Clark, for the benefit of his creditors, including in the schedule the invoices for the goods consigned to C. D. Jordan, merchant there (New Orleans), with orders to reship the same to Jordan, Ellis & Co., Cincinnati, Ohio, for sale, for and on account of Le Baron Putnam.

94] *Invoice, $9,500, one and half per cent..... $142 50
Policy..... 1 00
Freight..... 80 00
Package..... 5 00

228 50
9,306 69

$9,535 19

And indorsed in blank, and delivered to Bradley & Clark, one of the bills of lading of the goods from Boston to New Orleans. Bradley & Clark, before they took the assignment, were informed that the notes given for the purchase of the goods were indorsed by J. E. & Co., and remained unpaid. About this time Edwin Putnam relinquished his claim upon the profits of the goods. A few days after the assignment Bradley, one of the assignees, came to Cincinnati to meet the goods, but as they had not arrived, went on to Louisville, and there waited for their arrival. While he was there one of the plaintiffs (Bellows) descended the river in a skiff, met the Patriot with the goods on board, near New Albany—went on board, and having stated to the captain that Bradley & Clark were on to get possession of the goods—that Bradley was at Louisville waiting their arrival; and that his (Bellows') object was to take possession of the goods and retain the control, paid the freight. The bill of lading, signed at New Orleans, was canceled, and a new one executed by the captain, recognizing J. E. & Co. as shippers, and undertaking to deliver to them or assigns at Shippingport or Louisville. On the arrival of the boat at Louisville, and before the goods were unladen, Bradley demanded the goods of the captain, under the assignment. The captain gave an order to the clerk to deliver the goods to Bellows, but countermanded the order, when Bellows appeared with his drays to receive them. After some little delay the goods, through the agency of Bellows and Jones, were brought round the falls to Louisville, and it was finally agreed that they should be brought on to Cincinnati, and the rights

of the parties settled there. Captain James shipped the goods in
95] his own name on the Ben Franklin, and with Bellows *and Bradley came up on her to Cincinnati. On the passage Bellows tendered the captain the freight from Louisville to Cincinnati, and offered indemnity, which was refused by James. The boat arrived at Cincinnati on Sunday, and the goods were thrown out upon the common landing of the city. They were taken possession of by defendants, and placed in their warehouse. Very early on Monday morning the goods were *replevied* upon the writ in this cause, after which, the same day, Bradley presented to the plaintiffs a copy of the following letter, and proffered to pay the expenses on the goods. The plaintiffs, after perusing the letter, replied "that it was not necessary to tender them any expenses they had incurred on account of the goods mentioned therein" (meaning, as the witness understood, that if tendered, they would not be accepted):

"BOSTON, *February* 16, 1829.

"*Messrs. Jordan, Ellis & Co., Merchants in Cincinnati, Ohio.*

"GENTLEMEN: You are hereby informed that I have sold, transferred, and assigned to Messrs. Charles Bradley and John Clark, merchants in Boston, assignees of my effects, for the benefit of my creditors, the invoices of goods I shipped and consigned you for sales and returns about the 15th of January last past. You will allow them, or either of them, or their agent, to receive and take possession of said goods, before or on their arrival at Cincinnati. In case said goods shall come into your possession before said Bradley and Clark, or either of them, or their agent, shall have received and taken possession of them, you will nevertheles deliver them to the said Bradley and Clark, or either of them, or their agent. Said Bradley and Clark will pay, or cause to be paid you, all charges you have on said goods for transportation and insurance thereon from Boston to Cincinnati. You are hereby directed not to make sale of said goods, and not to dispose of them in any way whatever, excepting as above directed, without the authority of the said Bradley and Clark. Yours, etc.,

"LE BARON PUTNAM."

During the trial, evidence was offered, on the part of the plaint-
96] iffs, tending to prove that the notes given for the goods *were indorsed by them with the knowledge and approbation of L. and

E. Putnam, according to their original agreement; and that they had specially agreed that the goods should be held by the plaintiffs to raise funds to pay the purchase money, and that Putnams were to have no other interest in them than the profits and loss; and on the part of the defendants tending to prove that the notes had been indorsed by plaintiffs without the knowledge or consent of Putnams; and that Bradley, at Louisville, tendered to James the freight from New Orleans, and forbid him to deliver to the plaintiffs; which, as it was contradictory, it is not deemed advisable to recapitulate here. The jury found for the plaintiffs, and the defendants now move for a new trial, because the court erred in giving the cause to the jury.

In giving this cause to the jury, while commenting upon its various aspects, and having reference to the hypothetical cases supposed and urged by counsel, the judge laid down the following among other positions:

1. That the rights of the parties must be determined as they stood when the suit was commenced, and no tender made afterward of freight and advances by Bradley and Clark, or any tender made before, unless sufficient to cover all advances and liabilities accrued on account of the goods, could be taken into consideration to affect their rights.

2. Where goods are consigned by the owner to a person who has no interest in the consignment, or has made no advance on account of it, the owner may stop the goods while on their way to the consignee, and take possession to protect himself, and hold them for that purpose against the consignee.

3. That the delivery of goods to the master of a vessel, who is the carrier, is, constructively, a delivery to the consignee, subject to the right of stoppage *in transitu*.

4. If these goods were purchased by the plaintiffs for Putnams, on the credit of the plaintiffs, or on their credit with that of Putnam, or even purchased by Putnam, and consigned to the plaintiffs, and they, by contract, express or implied, were induced to make advances for freight, insurance, or otherwise, they would thereby acquire a qualified property in the goods, and the right to retain the possession *until their advances were refunded, [97 and their liabilities discharged.

5. That if the plaintiffs had incurred responsibilities, or made advances on account of the goods in good faith, resulting from their

undertaking with Putnam, they have a right to the possession of the goods against the defendants, their carriers, if they have paid or tendered the freight.

6. That a carrier, upon a bill of lading, containing an express stipulation to deliver to the consignee or his order, can not detain the goods from the consignee, under a mere notice from the consignor; and if he does, is liable on his contract for the damage, though a different rule might obtain upon a bill to deliver to the consignee, or the assigns of the consignor.

7. That in many cases a symbolical delivery was all that was necessary, or the thing to be delivered was susceptible of; and the jury might determine for themselves, whether the transaction on the Patriot, near New Albany, did not amount to an actual delivery to the plaintiffs, by the defendants, which they could not afterward rescind.

We have no bankrupt laws in this country, and are, therefore, in our investigations of this case, not subject to the embarrassing difficulties growing out of these laws, which have attended many of the English cases. The language of the charge to the jury is very imperfectly collected from the loose notes used on the trial, and although we may regret that it is not more explicit and clear, we must keep in view the case before the jury, to which it referred, and in reference to which alone, the jury received and understood it. It is not deemed necessary to pursue the course of argument adopted by defendants' counsel. It often exhibits great zeal and ability, but falls into frequent error as to what was in fact said by the court to the jury. The judges are satisfied with the verdict on the merits of the case in proof. Courts are always bound in the exercise of a sound discretion, to inquire how far the observations of the judge complained of, were material as well as erroneous; and to what extent they affected the merits of the cause; otherwise there would be no end to new trials, and the remedy would be 98] worse than the wrong. 10 Johns. 451; 5 Term, 425; *3 Johns. 528; 1 Johns. Cas. 250; 2 Cow. 479; 8 Cow. 223; 6 Cow. 118; 5 Wend. 48; 5 Mass. 101; 6 Mass. 350; 3 Ohio, 369; 3 Ohio, 112; 4 Ohio, 39.

There can be no question but that the owner of a chattel may part with his property in and dominion over it, without receiving the pay for it; and he may deliver any chattel he sells, symbolically and constructively, as well as by corporal touch. If he sells with-

out stipulation, for credit, or some other act indicating his intention to rely for his pay on the promise of the purchaser, or something other than the article contracted for, the law secures to him a lien on the chattel for its price, which he may assert at any time before actual delivery to the vendee. So entirely does the rule of law follow the principle of equity in this particular, that although there has been a constructive delivery to the purchaser, as to a middle man or a carrier upon a bill of lading, yet in case of real or apprehended insolvency in the vendee, it allows the vendor the privilege of stopping the goods, if he can, on their way to the vendee, and having regained the possession to himself, to assert his lien for the unpaid purchase. It is essential to liens, that persons claiming them have the possession of the chattel upon which they are claimed to operate. This is defined to be the right which one person possesses of detaining property placed in his hands, belonging to another, until some demand of his be satisfied. *3 East, 235; 2 Cow. 579. They are allowed for the convenience of commerce and natural justice, and are favored where there is an express contract, or where it is implied from the dealings of the factor. 4 Burr, 2220. And in such cases, though the general property in the goods is vested in the purchaser, the lien or special property is vested in the vendor. 1 H. Bl. 368; 2 Bl. Com. 448; 7 Term, 440; 7 East, 571.

The vendor's right of stoppage *in transitu* does not proceed on the ground of rescinding the contract, but rests expressly upon its continuance on the ground of an equitable lien; and if the goods are stopped, the vendee may recover them on his complying with the contract, or paying the price. Dyer, 29; 1 New. 69; Com. Dig., Agreement, B, 3; 3 Term, 464; 8 Term, 199; 3 P. Wms. 188; 2 H. Blk. 504; 3 Bos. *& Pul. 54; 12 Ves. 379. If the vendor has [99 been paid in part, he may stop for the balance, and the part payment only diminishes the lien *pro tanto*. 2 Kent's C. 427; 7 Term, 440-445; 1 H. Blk. 357, 363, n. 5; 3 B. & P. 44; 3 East, 93, 103, 381. This right does not exist except in case of insolvency, and can only be exercised when the property, by the shipment, is vested in the consignee. 8 Cranch, 333, per Story, Judge. The title may pass by mere delivery of goods under a contract of sale; or a lien may be acquired for advances, by a mere possession, under a contract for that purpose. But it is of the very essence of a lien that possession accompanies it. Having acquired possession of goods, the consignee may be rightfully considered as the special

owner of them, to the extent of his advances. Mason, 139. And there are many cases where the vendor's right of stoppage has been defeated by a constructive delivery only. 2 Kent C. 431.

Factors have also liens upon the goods of their principals, for charges incident to them, for a general balance due them as factors, and also for outstanding debts, for which they are only security. 3 P. Wms. 185; 2 Atk. 623; 2 Ver. 203; 1 Burr. 494; 4 Burr. 2214, sec. 18; 1 H. Blk. 501; 2 H. Blk. 503; 2 W. Blk. 1156; Cow. 251, 571; 6 Term, 258, 262; 2 East, 327; 6 East, 25, n.; 1 East, 4; 16 Ver. 280. As between the principal and factor, the general right of property in the owner will be made to yield to the special property of the factor, necessary to complete his trust or satisfy his liens. 2 H. Blk. 503. Yet the owner may, at any time before actual sale, by paying the balance, and discharging the responsibilities of the factor, withdraw his effects; and if the factor become insolvent, the goods remain the property of the principal, subject to the lien of the factor. 2 W. Blk. 1156. These liens are allowed for the convenience of trade, with a view to the nature of the factor's employment, and to encourage advances upon goods in his possession, or to be consigned to him, and are favored, 3 B. & P. 488, 498; and Lord Kenyon, 6 Term, 262, says, "the factor's right to his lien is an agreement which the law implies. If the factor has sold the goods, and parted with the possession, he has a lien 100] on the price in the hands of the purchaser, *for what is due to him, and the owner can not set up his right to the money, except where the factor has nothing due to him." Cow. 256, 571; 1 Burr. 494; 1 East, 4; 5 Bin. 392. And where the owner aliens the property, the purchaser takes it subject to the lien of the factor. 1 Burr. 489. So for insurance upon the goods, made at request of consignor, or in the course of trade. 1 Burr. 494; 2 East, 523. "There is no doubt," say the Supreme Court of the United States, 8 Cranch, 419, "but that agreeably to the principles of the common law, a factor has a lien upon the goods of the principal in his possession, for the balance of account due to him, and so has a consignee for advances made by him to the consignor. The consignor can not maintain an action against his factor, to recover the property placed in his possession, without first paying or tendering what is due to the factor." Buller, Judge, says, 6 East, 28, n.: "Where the consignee has paid the price of the goods, or is under acceptances for them, which is the same thing, the owner can not

seize them." But as between a principal and a mere factor, who has neither advanced nor engaged anything for his principal, the principal has a right to take back his goods at will, whether they be actually in the factor's possession, or only on their passage. 6 East, 25, n. So in case of the consignee's insolvency, before they came to his possession. 6 East, 17; 3 Term, 119; 4 Burr. 3047; 2 Kent Com. 72; 2 Rob. Ad. 391. The right of the owner of goods to countermand their destination, while under his dominion, is not questioned by these principles, but that is a right that can only exist where there is no interest in others in the goods, to be affected by the countermand.

A consignee upon a bill of lading to himself, or assigns, obtains a property in the consignment by the bill of lading, and may sell and transfer a title, while the goods are in transit, before they ever came to his actual possession, by indorsing the bill of lading, notwithstanding they have not been paid for; and Lord Mansfield, in 6 East, 27, n., says it has "always been held that the delivery of a bill of lading transferred the property at law." It has been determined that the moment goods are delivered by A. to a carrier, to be forwarded to B., *the property vests in B. 3 B. [101
& P. 46. Where a factor makes advances and incurs responsibilities, on account of consignments to him, the bill of lading vests such property in him, that he may insure, or even sell the goods, on the security and faith of the consignment, and the consignor can not stop them, without repaying what he has advanced, or is liable for, and no man can seize goods in opposition to one who has obtained a legal right, and advanced money upon them. 6 East, 32, n. Yet the interest vested in the consignee, by the delivery to the captain is not absolute to all purposes. So far as relates to the right of stoppage *in transitu*, it continues subject to the control of the consignor. 8 Cranch, 329. A shipment to the order of the consignee, he to pay the freight, was held to change the custody of the goods, by delivery to the captain. 1 East, 5. The bill of lading is a written contract for the transportation of goods. Its stipulations are as obligatory upon the parties as other written contracts. Their terms can not be varied by a *parol* agreement, though they may be affected by proof of usage or custom. 4 Ohio, 346. They are not conclusive against proof of fraud. 7 Mass. 306. The party in whose name the bill of lading is made out, has a right to demand the goods of the carrier, and if he be the con-

signee without interest, he may sell absolutely and transfer the property, before he receives it. 8 Cro. 329.

The carrier's right to hold goods against the consignee extends no farther than until he is paid for his carriage. 3 B. & P. 55; Ld. Raym. 752, 867; 6 East, 519; 7 East, 224. Chambres, Judge, in Oppenheim *v.* Russett, 3 B. & P. 54, says, "Perhaps the consignee himself may intercept the goods in their passage; and indeed I have little doubt that if he do intercept them in their passage, before the consignor has exercised his right of stopping *in transitu*, and do take an actual delivery from the carrier, before the goods get to the end of their journey, that such a delivery to him will be complete." Opposed to this is cited the declaration of Lord Kenyon (1 East, 242), that the right of the consignee to go out to sea, and meet the ships, could not be supported, because 102] it might go the length of saying *that the consignee might meet the vessel coming out of the port whence she had been consigned," and "there would then be no possibility of any stoppage *in transitu* at all." This cause has been overruled. 2 B. & P. 461; 3 B. & P. 54. And the better opinion now is, that if the vendee intercept the goods on their passage, and take possession as owner, the delivery is complete, and the right of stoppage is gone. 2 Kent C. 433. And if the property has once fairly arrived at its destination, so as to give the vendee the actual exercise or dominion over it, the right is gone. 4 East, 82. The delivery of the key of the vendor's warehouse to the purchaser, the paying storage for the goods, or the lodging an order with the keeper for their delivery, or the demanding and moving the goods by the agent of the vendee, have been held a sufficient delivery to take away the right to stop. 3 Term, 468; 1 Camp. 452; 2 Camp. 243; Caine, 182; 3 Term, 464; 14 East, 308. The securities are at an end if the goods are placed under the orders of the consignee at any intermediate place. 5 East, 175. In Coxe *v.* Harden, East, 218, it was held that upon a shipment to consignees, on a bill of lading, to the shippers or their assigns, the possession by the consignee of the bill of lading without indorsement, though it did not entitle him to call upon the captain for their delivery, and although he might be liable, on his bills of lading, to deliver only to the order of the shippers, for a breach of that contract, yet when once the goods were in possession of the consignee, or "those who had authority from him, whether

received rightfully or wrongfully from the captain, the right of stoppage ceased, and the property became indefeasibly vested, without any further control of the shipper over it." So it was held that when goods were sent from Manchester to Hull, to be from thence shipped to the consignees at Hamburg by their agent, the transit was at an end on their arrival at Hull. 5 East, 175. The supposition that the goods must come to the corporal touch of the consignee, in order to oust the right of stopping *in transitu*, is a figurative expression, rarely, if ever, strictly true. 5 East, 184. It has never been literally adhered to, 3 Term, 463, and is now exploded. 2 Kent C. 431.

*A written opinion of a highly distinguished jurist in [103 Boston, has been submitted to us by the defendants' counsel, that the right of a vendor "to stop *in transitu* is undoubted, unless the consignee has obtained a vested interest in the goods," and that to establish the lien there must be an agreement for it, and actual or constructive possession; and concluding "that if there was no advancement on the goods, and no responsibility assumed to the vendors, there could be no foundation for the lien to rest on." With this opinion, so far as it asserts the law, we fully concur. The only difficulty for the defendants will be in bringing their case within its principles. The assignment of Putnam to Bradley and Clark has no other effect upon the case than to place them, from its date, in Putnam's shoes, and to enable them thenceforth to do exactly what he might have done if it had never been made, and nothing more. What, then, were the legal rights of these parties?

The general question is, whether this consignor shall be held obliged to do justice to the plaintiffs before he is suffered to retake these goods? And it is said, if a court of equity would sustain the demand in this class of cases, upon the broad principles of justice, it is good at law. 4 Burr. 2218, 2220. Before these goods were purchased it was agreed that they should be bought on credit, shipped to the plaintiffs, who should sell them, and raise and remit funds to meet the notes given for the purchase. The obligations given on the purchase were indorsed by the plaintiffs. The fair inference from this state of facts would be that the indorsement was made in execution of the agreement; if so, it is conceded the lien of Putnam is gone. Whether that was the fact was left to the jury, and if found, the lien gave the plaintiffs

power to retain possession of the goods until indemnified, and so the jury must have understood the court. The same rule applies if any advances were made, or liabilities incurred upon the shipment, with the knowledge and consent of Putnam, for drayage, insurance, or freight. The difference is only in the extent of the lien. The letter of advice of the shipment showed an agreement to rely on the promise of one of the plaintiffs to remit funds to meet the notes given for the purchase; the proceeds were not to be 104] *drawn for. It also contained a request to obtain insurance from New Orleans up on the faith of the consignment. The bill of lading to New Orleans, and the letter of advice sent with it, showed the freight, to that place, unpaid and chargeable on the shipment to the plaintiffs, and which was paid there by the agent of the plaintiffs. The schedule accompanying the assignment to Clark and Bradley contained the name of the vendors of the goods, the amounts, and also a memorandum of two hundred and twenty-eight dollars and fifty cents of insurance, freight, and drayage, chargeable upon the invoices. If the indorsements there for the purchase are thrown entirely out of view, here were advances under liabilities on account of these goods by the plaintiffs, and the shipment to them and delivery to the carrier was constructively a possession in them, to the extent of that lien, subject to the right of stoppage *in transitu*, when discharged by the consignor. If the indorsement on the notes were without the knowledge and consent of Putnam, he had no right to stop these goods without paying or tendering the advances actually made and the expenses incurred. There was no evidence of any attempt on the part of Putnam to satisfy this lien until after suit brought; and it can not seriously be urged that a tender afterward affected the case. The claim of a right to hold for a greater lien, which it is supposed would be held equivalent to a refusal, was made at the same time, if at all. Having then got the possession, at the end of the voyage, the lien of the plaintiffs upon common principles, would attach for all their liabilities, though if payment had been before tendered, upon a proper state of pleading, the lien for the unauthorized liabilities might have been avoided. It was properly left to the jury to determine also the character of the possession below Louisville; for although it might be obtained expressly to prevent a stoppage by the consignor, yet it might be good to the extent above supposed, if no

further, and if not limited by payment or tender until after the goods arrived at the end of the voyage, might possibly be effectual to the whole extent claimed. In these particulars I do not see how the jury can have been misled to the prejudice of the defendants by the charge of the court. The order for delivery, given to Clark and Bradley, was only upon their *paying [105 all charges on said goods, for transportation and insurance, from Boston to Cincinnati! This was no countermand by a consignor having the sole interest in the goods. It was no attempt to stop *in transitu*, on account of the insolvency of the vendee, for there was no insolvency, nor proof of any. No moral turpitude is perceived in the measures resorted to in order to obtain the actual possession of these goods below Louisville. It is but an ordinary contest between two claimants, each having a constructive, and striving to secure an actual possession to promote his own interest. If it be true, as urged, that a constructive possession can not become the base of a lien, that is fatal to Putnam's claim. He never had actual possession, and probably never saw the goods. The actual possession had been taken by one of the plaintiffs; and the claim of possession in Putnam is entirely constructive, springing from his ownership of the goods.

Passing from these considerations, what was the situation of these goods at New Orleans? If, upon their arrival there, all had been done by the shippers they were to do to give possession to the plaintiffs, and they were delivered to the agent of the plaintiffs for their direction as to their ultimate destination, then the transit of the goods ended there, and the possession of the plaintiff was then complete. Jordan swears that he received the goods and reshipped them as the agent of the plaintiffs, under their instructions. He debited them with the expenses and forwarded the bill, according to order. The bill of lading sent to him made the goods deliverable to him on the order of the plaintiffs. Can it be doubted that the plaintiffs might have countermanded the delivery to Jordan at New Orleans, and directed the goods elsewhere or there taken them to themselves? The bill of lading, executed by the defendants there, was a contract between the plaintiffs and the defendants, by which the defendants acknowledge to have received these goods for the plaintiffs, and promise to deliver them at Cincinnati to them or their order. The law confers no power upon one party to a contract to rescind it at his own pleasure.

The consent of both parties is as necessary to its dissolution as to its formation. Is there any principle of justice or equity, growing out of the circumstances of this case, protecting the de-
106] fendants *in their refusal to execute this contract? None is disclosed. But the parties to the contract did cancel it near New Albany, and entered into a new one to deliver the goods at Louisville. Was it unlawful for them to do so? Why did the defendants refuse compliance with it? Not because they were defrauded or imposed upon, but because the agent of Putnam demanded the goods and notified them not to fulfill the agreement. The arrangement to bring the goods on to Cincinnati afterward can not injuriously affect the plaintiffs. They might be charged with the additional transportation. But the carrier's lien for this, if it ever attached, was destroyed by the tender and refusal on the way, as was that for the transportation from New Orleans to Louisville by the payment on the river. At Cincinnati the originally contemplated voyage was complete; the whole freight had been paid, or tendered and refused. There remains no shadow of lien for carriage on the part of the defendants. A lien once parted with can not be resumed. Abbott on Ship. 246; 6 East, 662. If the consignee requires a delivery to him on board the ship, and directs the goods not to be landed, it is said the master must obey. 4 Term, 260. The general rule is, when there is no special agreement or custom to the contrary, that a deliverance must be to the consignee in person; but if there is a custom or agreement, then a delivery at the wharf discharges the master. 5 Term, 389; 3 Bod. & Bing. 177; 6 Moore, 469; 4 Price, 34; 2 Barn. & Ald. 356; 2 Barn. & Ald. 58; 1 McClel. & Young, 129; 4 Bing. 476.

The question remains, what right had the defendants, who are mere carriers, to take these goods from the wharf at Cincinnati to their store-house, and defend their possession against the very persons with whom and to whom they covenanted to deliver them? Their charge had been fully paid and tendered. The demand interposed by Bradley and Clark, in no event can go beyond their rights. The consignees were solvent; their circumstances had undergone no change since the shipment of the goods upon an agreement that they should advance freight and insurance, and have the profit of selling, which confers upon the vendors any equitable right to interfere with the contract, to prevent great and unjust loss. There was nothing which, by the terms of their contract

*with Putnam, in any aspect of it, they were to do, to be [107 entitled under the contract that remained undone. It is not a case of a naked shipment without contract or interest in the consignee. The right of Putnam, therefore, to rescind the contract at his own pleasure is not very apparent. By the issues, the defendants claim no right in themselves; and the jury had a right to consider the facts, and have the law given them upon each issue in the cause.

The defendants conduct their defense for the benefit of Bradley and Clark; yet much is said about the hardship of the case, and we are admonished that our decision not only involves the commercial character and credit of the state, but the character of the judiciary also. It was in evidence that the plaintiffs offered the defendants ample indemnity against loss from a delivery to them, which was refused. If they be now without indemnity it is their own folly, and calls for little sympathy even from those in a situation to yield to its influence. Conflicting claims to goods often arise, and it is difficult for a carrier to know who has the right. In such cases, Chancellor Kent, in his 3 Com. 170, says, "prudence would dictate that he deliver the goods to the person on whose indemnity he can most safely rely." Again, "if the consignee has failed, and the goods have not been actually sold by him on their transit, he should, without doubt, deliver to the consignor; if otherwise, to the consignee. The consignor having made a consignment has not an unlimited power to vary it at pleasure. He may do it only for the purpose of protecting himself against the insolvency of the buyer or consignee. If the difficulty be great he may deposit with some bailee, and compel the contending parties by bill of interpleader to litigate their rights between themselves." 3 Kent, 6, 171; Abbott on Ship. 381; 6 Rob. Ad. 321. Without some step of this kind we do not see how he can defend his possession against the express terms of his own bill of lading, by which he is excused from delivering only by the act of God and the public enemies. Co. Lit. 89, a; 3 Esp. 127; 1 Wil. 281. The commencement of this suit did not prevent a resort to the bill of interpleader, to secure the control of the goods for the benefit of the successful party; but no step of that kind is taken. Upon a view of all the circumstances of the *case we are [108 satisfied that both the law and the facts are with the verdict. The motion is overruled.

The defendants' counsel, in the event of a decision against them on the motion for a new trial, have interposed a motion in arrest of judgment, on the ground that the plaintiffs' replications and pleas to the avowries are departures from their declaration:

1. In declaring upon a property in themselves, and in their replications and pleas setting up a lien.

2. In declaring for an unlawful taking, and setting up in their replications and pleas only an unlawful detainer.

The usual method of taking advantage of a departure in pleading is upon demurrer. Here the parties joined several issues to the country, and a verdict has passed. The defendants come with a bad grace now with objection to a judgment, because there was a departure in pleading which they chose to overlook at the proper time. Yet if the issues are so perfectly immaterial that the court can not know for whom to give judgment, it is not aided by the verdict, and a repleader will be awarded. In this case there are several issues upon which no departure is alleged, and against which no want of materiality is urged. The verdict on the first finds the defendants guilty of the matter alleged against them in the declaration; on the second, that they took the goods; on the third, that the property was not in Bradley and Clark. Without a necessity for looking further, we can easily see on these issues for whom to render judgment. Indeed, it would be difficult to find a departure in pleading here, if the question was properly presented. A new trial is never granted for a defect in the pleading. 1 Johns. 510; 15 Johns. 212.

The motion can not be sustained. Judgment on the verdict.

109] *BUSH ET AL. v. CRITCHFIELD ET AL.

Where, upon demurrer, the matter of a plea is adjudged no bar, and a writ of inquiry awarded, the case is not opened by the jury of inquiry returning a special verdict, finding the same facts. The judgment on the demurrer estops the party against whom it is given.

A covenant with B. that C. shall sell and account for the price to B. for all merchandise B. may put into C.'s hands to sell. B. settles with C., finds

a balance due, and takes C.'s note, one day after date, for that balance: Held, that if the note is not paid, A. is liable on his covenants.

Where justice is done by the verdict, the court will not grant a new trial and leave to plead to let in a mere technical defense.

THIS cause was reserved for decision here, in the county of Knox, and came before the court on special verdict.

The declaration was in covenant, and stated that on June 27, 1825, the defendants covenanted with the plaintiffs, that if the plaintiffs would furnish one D. B. McConnell with goods, to sell on commission, at such per cent. as the plaintiffs and McConnell had, or might agree upon, that the defendants would be responsible for the faithful performance of McConnell, for one year from the date, and as much longer as McConnell should be justified in the sight of both plaintiffs and defendants; and that McConnell should render a true and just account of all merchandise delivered to him by the plaintiffs, and of all sales made by him, as often as the plaintiffs called on him for them; and that the said McConnell should faithfully perform his covenants with the plaintiffs, contained in an article dated April 18, 1825, whereby he covenanted faithfully to sell, and account for merchandise delivered him to sell by the plaintiffs, on commission, and for the sale of articles he received in barter for the goods, etc. It is then averred by the declaration, that the plaintiffs delivered to McConnell to sell, in pursuance of the articles, large quantities of merchandise, and that he did not, for one year, from June 27, 1825, faithfully account and pay to the plaintiffs all the money he received for said merchandise, but that he had received for said goods eighteen hundred dollars, which he neglected and refused to pay to the plaintiffs. The declaration contains other averments and other breaches.

The defendants pleaded: 1. Performance. 2. That on April 26, 1826, McConnell settled and accounted with the plaintiffs for all the goods he had received of them, and for all the sales he had made, and returned to them goods to the amount of fifteen hundred dollars, and made and delivered to Chauncey Bush, one of the plaintiffs, a sealed bill for eight hundred and sixty-four dollars and thirty-six cents, payable one day after date, and to H. Tuttle, another of the plaintiffs, a sealed bill for the same sum, pay- [110
able *at the same time, which notes were made by McConnell ac-

cording to an agreement with the plaintiffs and McConnell, in full satisfaction of all accounts and demands of the plaintiffs, on account of any goods which he had received of them, on said contracts, or on account of any sales made by him of those goods.

The plaintiffs, by general replications, denied the facts in the pleas, and concluded to the country. The defendants demurred to the replications. On this demurrer judgment was given for the plaintiffs, and the cause continued for inquiry of damages. 4 Ohio, 103.

On the inquiry, the jury returned a special verdict, by which they found, that on April 17, 1826, the plaintiffs and D. B. McConnell had a settlement of their accounts, on which McConnell was found indebted to the plaintiffs in the sum of one thousand seven hundred and twenty-eight dollars and seventy-two cents, for goods sold on commission, and not accounted for; that McConnell then executed two single bills, one payable to Chauncey Bush, or order, one day after date, for eight hundred and sixty-four dollars and thirty-six cents, his share of the sum of one thousand seven hundred and twenty-eight dollars and seventy-two cents, the other for the same sum, payable one day after date, to H. Tuttle, for his share; that before the commencement of the suit, one of the defendants admitted that they had a lien on a house and lot to secure them against their liability for McConnell, but which he believed insufficient to cover the balance due on these notes; that in his opinion the defendants were discharged by the taking of the notes; that one of the plaintiffs, after the commencement of this suit, said, that at the time of the taking of the notes, he considered the securities were thereby discharged. The jury further found that there is due on the two notes twelve hundred and sixteen dollars, and submitted that if from the circumstances, the sureties were discharged, the verdict should be one cent, if not, for one thousand two hundred and sixteen dollars.

H. Stanbery and H. B. Curtis, for the plaintiffs, contended:

111] *1. That the special verdict found only the matter of the second plea, which, having been adjudged bad upon demurrer, the case was not open to be affected by the verdict. The defendants were estopped.

2. That upon the facts found judgment ought to be entered for

the damages claimed, one thousand two hundred and sixteen dollars.

On the first point they cited Stephen on Pleading, 128, 239; Com. Dig., Estoppel, A, 1. On the second point they cited no authorities.

G. JAMES, H. H. HUNTER, and B. S. BROWN, for defendants, cited no authority on the first point. On the second, they cited 1 Phil. Ev. 148, 149; 2 Strange, 1114; 1 H. Black. 252; Doug. 302, n. 2; 7 Cranch, 299; Cro. Cha. 415; 1 Burr. 9; 9 Wheat. 680; 1 Mason, 313; 1 Paine, 305; 2 Saund. 412; 4 Taun. 339; 2 Caines' Cases, 1; 10 Johns. 180; 7 Term, 254; P. Wms. 532; 1 Carth. 446.

Opinion of the court, by Judge COLLET:

The settlement and giving the single bill on that settlement, by McConnell to Bush and Tuttle, for the balance due from McConnell to the plaintiffs, found by the verdict, are facts which were stated in the defendant's plea. The plaintiffs contend, that as the replication originally filed to the defendants' plea in bar denied its truth, and as the demurrer admitted the truth of the replication, and consequently that the plea was false, the defendants are estopped from insisting on these facts, on the inquiry of damages. A demurrer admits the truth of the pleading demurred to, as far as is necessary, to enable the court to determine on the pleading objected to, and no further. In this case the demurrer was used as a demurrer to the declaration; it admitted the covenants stated in the declaration, that the plaintiffs delivered, in pursuance of the covenant one cent's worth of goods to McConnell, and that McConnell violated the covenant by not accounting for one cent's worth of goods, whereby the plaintiffs were injured one cent; it admitted no more, for no more was necessary to enable the court to determine *whether the declaration was or was not good. [112 A plea in bar frequently contains a number of facts; if either of them is not true the bar is destroyed, and the plea, as a bar, is false. As, where B. covenants with A. to build three houses; A. sues B. for not building them; B. pleads in bar performance, specially; A. replies, denying the plea. On the trial of the issue, if it appears that two of the houses are built and occupied by A.; that there is one dollar's worth of work necessary to complete the third, the jury must find the replication true and the plea false, and shall assess the damages of A. at one dollar, or such sum as

shall compensate A. for his injury. The evidence produced to prove the issue is the evidence indispensable to enable the jury justly to estimate the damages.

If there had been a demurrer to the replication it would have admitted that the replication was true, as the jury found that the facts stated in the bar were so far false as to destroy the bar, and no farther; that is, that the three houses were not all finished.

On an inquiry of damages the jury would not have had to try the issue; the demurrer had admitted that the facts stated in the plea were so far false as not to be a bar; but they would hear all the evidence relative to the building of the houses; that would be indispensable to justice, and not incompatible with the admission that there was no bar. The decision of the court in this case, that the replication was good, determined the issue, deprived the defendants of their bar, and subjected them to have damages assessed against them on the inquiry, but nothing more. On an inquiry after a default, or a judgment or demurrer to the declaration, or against the defendant on any other pleadings, the question with the jury is the same; what damages has the plaintiff sustained by the breaches assigned? The evidence must, of necessity, be the same.

"An estoppel is where a man is concluded by his own act or acceptance, to say the truth." Comyn's Digest, Estop, A, 1. When the jury find the truth of the fact the court will give judgment according to the finding, without regard to the estoppel. Ibid. E, 10. All pleas in estoppel are regarded unfavorably, and must be certain in every particular. Steph. Pl. 357. The evidence on this
113] ground can not be rejected. *But that these notes to Bush and Tuttle so changed the contract with McConnell and the plaintiffs, as to be a discharge of the defendants on an inquiry for damages, can not be successfully contended. The inquiry with the jury is, what damages have the plaintiffs sustained by the unfaithfulness of McConnell? The defendants, on the inquiry, could prove that McConnell received no goods of the plaintiffs, or that he had returned them all, or that he fairly sold all he received, and justly accounted for, and paid to the plaintiffs the whole amount of the sales, if the facts were so, and reduce the damages to one cent. If pleaded these would have been bars, but they are subjects, properly, of inquiry with a jury, in assessing damages. There are other bars not so; as infancy and duress. 1 Chit. Pl. 479. They

do not show that the plaintiffs sustained no damage, nor that the damages have been paid; and, therefore, the jury of inquiry in covenant, can not consider them; so in this case, these notes being given to Bush and Tuttle, or that they were made payable one day after date, does not show that the plaintiffs sustained no damages, or that the damages have been paid, but the contrary.

The defendants, if the court are of opinion that they can not avail themselves of this defense, in mitigation of damages, move for leave, on terms, to plead it in bar. We do not know the exact terms of the second contract between McConnell and the plaintiffs, under which he received and sold the goods, after the date of the defendants' covenants. By the defendants' contract, if McConnell was furnished with goods, by the plaintiffs, for a year at least, to retail, the defendants undertook that he would faithfully sell, and account with, and pay over the proceeds to the plaintiffs. That he should retail some on credit was not inconsistent with their undertaking; if he did, it could not be inconsistent with the defendants' undertaking, that, on a settlement with McConnell, he should have a reasonable time to collect and pay over that part of the price of the goods, which was uncollected; neither could it be inconsistent with it to take McConnell's note or notes, evidencing the balance found due from him on the settlement and giving time to pay. Before the end of the year for which McConnell was to be *supplied with goods, he and the plaintiffs closed their [114 business. Could it be expected that time would not be necessary for McConnell to pay?

The object of the ordinary letter of credit, given to a merchant, warranting his pay for goods he might purchase, is that he may have time to pay; the giving him the ordinary credit, the taking a note for the amount, the indorsing the note to a bank in the neighborhood of the maker, or to an individual for collection, is not a discharge of the guarantor's undertaking; it is all within and according to it.

The opinions of the plaintiffs or defendants, as to the effect of giving these notes, on the guaranty of the defendants, can not affect it. Will the opinion a man may entertain of his title to a tract of land either vest or divest the title? Will the court admit or reject the deeds according to the opinion that the parties may at some time have expressed? That an act done under a mistake of the law should bind, is a principle hard, and complained of; but

that the mere error, without any act being done in consequence of it, should divest a person of his right, would be still harder. That the defendants were indemnified, can not subject them to the demand of the plaintiffs, if they would not otherwise be subject to it.

Whether taking the notes, one payable to Bush, the other to Tuttle, for their several proportions of the balance due from McConnell, and not to the plaintiffs jointly, is such a variation of the contract with McConnell as to discharge the defendants, it is not necessary for the court to decide. If it would the court would not grant a new trial, and leave to plead, to enable the defendants to set up such a bar; they would grant it only to let in a defense, where substantial justice required it. The taking these notes in this manner did not in any way injure them. The defendants covenanted with the plaintiffs, that if they would deliver the goods to McConnell they would indemnify them for any loss they might sustain by McConnell's not paying over the proceeds of their sale. Relying on this, the plaintiffs advanced their goods to McConnell, and he, of the proceeds of these goods, has kept back, and still keeps back, twelve hundred and sixteen dollars.

115] *Every principle of justice requires that the defendants should pay this sum to the plaintiffs. 3 Cranch, 492. Judgment must be entered on the verdict for twelve hundred and sixteen dollars and costs.

Isaac Bates v. Thomas Cooper.

New trial not granted, because against equity if conformable to law.

Repleader not awarded after trial upon issue where the merits have come fairly up, and the court can safely pronounce judgment on the verdict.

The act of assembly for constructing the canals, authorizing the taking of materials for that purpose, is constitutional, and extends to taking materials for repairs.

This case was adjourned here for decision from the county of Hamilton. It came before the court upon a motion made by the plaintiff for a repleader and a new trial. It was an action on the case brought by the plaintiff, owner of the reversion in certain lands through which the Miami canal passed, against the defend-

ant, charging him with entering the land unlawfully, and digging up and carrying away the soil. Two pleas were pleaded not guilty, upon which issue was joined. A special plea in bar, alleging that the defendant was a superintendent of the Miami canal; that a breach was made in it that rendered repairs necessary; that for the purpose of procuring materials for such repairs, and for no other purpose, the defendant, by direction of the canal commissioners, entered upon the land which adjoined the canal, at the most suitable and convenient place to obtain earth and gravel to repair the canal, and took the earth and gravel for that purpose and no other. The plaintiff replied that the land and place of entering and taking the earth and gravel was not the most suitable and convenient place for taking, etc., upon which issue was joined.

On the trial a question arose, whether the canal laws authorizing the commissioners to take materials for repairing the canals were constitutional. The court ruled that, under the issue, that question could not legally be drawn into discussion. The jury found for the defendant.

A motion was made for a new trial, on the ground that the verdict was against equity and law. A motion was also made for a repleader, alleging that according to the opinion of the court, at the trial, the issue was immaterial.

*STORER and FOX, in support of the motions, cited 2 Dow. [116 Par. Cas. 519; Cooper, 78; 20 Johns. 104; 7 Johns. Ch. 315; 5 Petersdoff, 3-15; 1 Maule & Sel. 32; 1 Black. Com. 140; 1 Chit. Plead. 510, 512; 3 Ohio, 426; 11 Mass. 265; 12 Mass. 466.

N. WRIGHT, against the motions, cited 2 Saund. 319, n. 6; 2 Ohio, 208; 1 Wil. 255; 2 Tidd, 827, 828; Willes, 443; 3 Ohio, 410; 20 Johns. 740; 7 Johns. Ch. 337; 1 Cow. 564; 7 Cow. 352, 565; 8 Cow. 143.

Opinion of the court, by Judge WRIGHT:

The plaintiff, who has the reversion of certain lands described in the declaration, in the possession and occupancy of his tenants, complains that the defendant entered the premises, dug up and removed the soil, etc., to his damage.

The defendant pleaded, first, not guilty, and secondly, that the

defendant was a superintendent of the Miami canal, duly appointed, and a lock and part of the bank of the canal having become low and broken, the defendant, for the purpose of completing the canal and rendering it navigable, and for no other purpose, by order of the canal commissioners, entered upon the land which adjoined the canal at the most suitable and convenient place to obtain earth, etc., to repair the canal, and took the earth necessary to complete such repairs, and for no other purpose, doing no unnecessary damage.

The plaintiff replied, that the land and place of entering and taking the gravel, etc., was not the most suitable and convenient place for obtaining earth to repair the canal, upon which issue was joined.

The state of pleading presented to the jury the general issue, and the fact whether the place where the party entered, etc., was the most suitable place for obtaining the gravel for repairing the canal. All the other allegations in the plea not being denied were, for the purpose of the trial, admitted; and left upon the defendant the burden of proving the affirmative of that proposition.

On trial, a verdict passed for the defendant, and it is now 117] *moved to set aside the verdict, because it is contrary to equity, and contrary to law. The plaintiff also moved the court for a repleader, because the issue made up was an immaterial issue.

As to the motion for a new trial, but little need be said. It would be novel to grant a new trial, because the verdict was against equity, if it corresponded with the proof and the issue. No reason is urged to support the claim that the jury were misled in the law arising on the evidence, by the court, or otherwise. The judges who tried the cause are satisfied that the verdict followed the issue, and could not have been different on the issue submitted to the jury.

The application for a repleader is strenuously urged by counsel on one side, and warmly resisted by those in opposition. The court are asked to adopt the rule of the court of King's Bench, to reject applications for a repleader, after demurrer, or favor of the party committing the first fault in pleading. Tidd's Prac. 824; 2 Saund. 319, n. 6. We think that rule is too rigid for our practice, and would often interpose obstacles in the way of the great ends of justice. Where an issue is taken on some point that will not determine the merits of the cause, and the court is at a loss

for which of the parties to give judgment, we should consider the issue immaterial. Gilb. H. C. P. 147; 1 Lev. 32; 2 Saund. 319, n. 6. And we are not prepared to say we would render judgment in such cases, the merits undetermined, to punish the party first in fault, or who had put in a demurrer. The application in this case is in time, provided the case be made out of a finding upon which no judgment can be rendered.

In favor of the repleader two points are relied upon:

1. That the matter of the special plea is no *bar* to the action.

2. That if the matter were otherwise a *bar*, that the law of Ohio authorizing the taking materials for the structure of the canals is unconstitutional and void.

3. If valid, that the authority does not embrace the taking materials for the repair of the canal.

The plea sets up a justification under the canal laws, authorizing the entering of lands adjoining the canal, and appropriations *of materials for the structure, and brings the defense [118 within the wording of the act, all which the plaintiff, in his replication, admits, except only the allegation that the place of entering the land and taking the earth was at the most suitable and convenient place. If the defense is good in law, we think there is no objection to the form of the plea or its extent.

Is the law unconstitutional? If it is, it has no binding force on the court or the citizen. The clause in the constitution which is supposed to be violated is in these words: "Private property shall always be held inviolate, but always subservient to the public welfare, provided a compensation in money be made to the owner." Art. 8, sec. 4. The Supreme Court, in this state, has uniformly decided those acts of the legislature constitutional, which authorized private property to be taken for the public use, for roads, etc., where provision has been made by law for compensating the owner; so that the person injured might get compensation if he desired it. 4 Ohio, 284. But we are not advised that the courts have ever held, that compensation must be actually assessed and paid over to the owner, before a public work can progress, whether he desire it or not. The constitution must receive a construction that will leave it possessed of practical utility. The public interest is to be promoted while private rights are secured—but can it be for a moment supposed that a road or canal of general importance to the community should be interrupted

or suspended at the capricious will of an individual? Chancellor Kent, in New York, 20 Johns. 744, goes much further, and maintains a law constitutional, and a valid justification to an officer, which authorized the taking materials without providing any compensation, upon the ground that all are bound to confide in the good faith of the legislature to make the required compensation when required. See also 7 Cow. 352, 585; 8 Cow. 147; 11 Mass. 364; 12 Mass. 468; 7 Johns. Ch. 315. The law in question contains ample provision for a cheap and easy assessment of individual damage and the payment of the amount in money, and we are of opinion it conforms to the constitution. If the law is constitutional it must afford protection to the officer acting under it,

119] *It is further urged that the case made in the plea is not within the legal import of the acts of the legislature. It is claimed that the authority only extends to the taking materials for the *construction* of the canal, and does not authorize the taking materials to *repair* a casual breach. The act to provide for the internal improvement of the State of Ohio by navigable canals, 23 Ohio L. 50, makes it lawful for "the canal commissioners, and each of them by themseles, and by any and every superintendent, agent, and engineer employed by them, to enter upon, and take possession of, and use all and singular any lands, waters, streams, and materials necessary for the prosecution of the improvements intended by this act, and to make all such canals, etc., and other works and devices as they may think proper for making such improvements, doing nevertheless no unnecessary damage," and "if the lands, waters, or materials are not donated by the owners to the state, they shall vest in and become the property of the state on the payment of damages to be assessed by appraisers."

The defendant's counsel admit that this provision, if constitutional, would afford protection against the taking of materials to prepare the canals for public use, yet contend that it extends no further than the opening of the canals for navigation. The work being then completed, that further legislation is necessary to empower the superintendents to take materials for repairing a breach. If this position were tenable, it would be difficult to give it application to the present case. The issue presents no such fact to the notice of the court, and we can hardly be asked to take judicial notice of such a fact as if it depended on general law. If the plaint-

iff would have presented that matter to the court, he should have so replied, and not taken issue as he has on the single proposition, whether the place whence the materials were taken was the most suitable and convenient place for obtaining earth for the repair of the canal. The statute must receive such a construction as looks to the accomplishment of the great objects the legislature had in view, and not such a one as would make it powerless to attain to that end. The object was the structure and maintenance for use of navigable canals. Power was given or intended to *be [120 given to effect that end. Is the grant of power so narrow that no authority is given to change an improvident location, or to repair the failures and breaches of daily or hourly occurrence in the prosecution of such a work? If the authority to take the materials for the prosecution of the improvements intended by the act does not embrace cases of casual sinking of the banks and repairing breaches, we are at a loss to discover its practical benefit. Such a construction would be altogether too narrow for the liberal policy of the act, and would warrant the setting up a petty private interest in opposition to the great interests of the whole people of the state.

Several cases have been pressed upon our consideration, where private corporations, for constructing canals, have been restricted to a rigid exercise of the literal power granted in their act of incorporation to appropriate to their public structure private property. 2 Dow's Parl. Cas. 519; Co. R. 78; 5 Petersdorff Ab. 3–14; 1 Maule & Sel. 32; 20 Johns. 104; 7 Johns. Ch. 315. Whatever construction we might feel constrained to put upon an authority given to individuals to appropriate the property of others to their private advantage, we can not believe the cases have any very material bearing on agents and officers exclusively public, engaged in the construction of a great public improvement, for the sole benefit of the state. It would, however, be a sufficient answer to this objection to say that the plea justifies the entering the premises and to bring the earth "to complete the canal and for no other purpose." After verdict an objection to the form of the plea, either for the purpose of obtaining a new trial or a repleader will not be received, particularly if it appear, as in this case, not to be in furtherance of justice, but an effort to place technical impediments in the way of its advance.

Both motions overruled.

121] *JOHN J. BRICE v. CHRISTOPHER MYERS AND OTHERS.

Claims of creditors against voluntary conveyances of their debtors are to be favored. Father who is in debt, or liable upon a contract for damages, conveys property to his children, without intent to defraud the creditor at the time.

Conveyance held fraudulent if necessary to secure a creditor.

THIS was a suit in chancery, adjourned here for decision from the county of Knox.

The complainant was a creditor of Christopher Myers, and the object of the bill was to set aside certain conveyances made by him to his sons as fraudulent, and to subject the property conveyed to the payment of the complainant's debts. The case made in the papers was this:

In the year 1819, Christopher Myers contracted with the complainant for an exchange of land, valued at twelve thousand dollars. Of this sum, nine thousand dollars was paid by the conveyance of a tract of land. The payment of fifteen hundred dollars was secured by a mortgage upon part of the land obtained from complainant, and a covenant was executed by which C. Myers bound himself to convey to complainant, within five years, a house and lot in Zanesville, or pay him fifteen hundred dollars. This house was then the property of a son-in-law of C. Myers.

In 1820, C. Myers conveyed to his sons and sons-in-law, who are all defendants, five tracts of land, one to each, for the consideration expressed of one thousand dollars each, but, in truth, for the consideration of natural love and affection, and an annuity from each, during life, of twenty dollars. At the time these conveyances were made, they included all the property then owned by C. Myers.

At the time of making the original contract with complainant, the sons and sons-in-law of C. Myers were present, and it was declared by him, in the presence of them and of complainant, that his object was to provide for his sons and sons-in-law, and settle them arouud him.

Subsequent to the conveyances by C. Myers to his children, he failed to obtain for complainant a conveyance of the house and lot in Zanesville. Suit was brought, and judgment recovered for fif-

teen hundred dollars, which is the debt which the bill seeks to have paid.

At the time of making the original contract, C. Myers was not involved in debt. In the different answers of the *defendants, it [122 is alleged that complainant agreed that upon receiving a conveyance of the house and lot, he would release an equal value of the mortgaged lands. That he refused to do this, but prosecuted the mortgage, and sacrificed the lands; and for this reason the conveyance was not made. A conversation importing an understanding, such as is claimed in the answers, was proved to have taken place, while counsel was preparing the deeds and mortgages.

EWING and H. STANBERY, for complainants, contended that it was a plain case of a voluntary conveyance, made by a person indebted at the time; and therefore void against creditors. They cited 3 Johns. Ch. 481; 8 Wheat. 238; 11 Wheat. 205; 1 Atk. 16; 2 Blk. 600.

SULLIVAN, for defendants, maintained that at the time of making the conveyances to the sons and sons-in-law, C. Myers was not so indebted as to affect the validity of these conveyances, otherwise made in good faith, and for a valuable consideration. He cited Com. Rep. 255; 2 Ves. 1; 1 Atk. 15; 2 Cowp. 711; 1 Cox, 273; 2 Ves. 326; 1 Pet. C. C. 460, 464; 1 Day, 525; 2 Des. 332; 1 Bay, 163; 1 Ohio, 321; 3 Ohio, 527; 2 Brown, 90; 15 Mass. 92; 1 Ves. 128; 1 Johns. Ch. 429; 17 Mass. 328; 1 Cox, 405; 1 Johns. Ch. 485; 1 Swift, 274.

Opinion of the court, by Judge COLLET:

The question first to be determined is, are the deeds of Christopher Myers to his sons and sons-in-law fraudulent as to the demand of Brice.

A person is trusted or obtains credit in proportion to the property he appears to own; the creditor, when he trusts him, looks to his possessions as evidence of his ability to pay, and as a fund from which, if other resources of the debtor fail, he is to receive his demand. After the credit is obtained, for the debtor to divest himself of his property by giving it away, thereby rendering himself unable to pay his debt, or to perform his contract, is unjust; it is a fraud upon his creditor. Whether, by making the gift, the

debtor intended to prevent the payment of the debt or not, can make no difference as to the rights of the creditor; his injury is
123] the same. *It is the duty of the debtor to retain at least a sufficiency of his property to pay all his debts, and perform all his contracts; if he does not, justice requires that the property should be followed into the hands of the donee by the creditor. He who combines with a debtor to defraud his creditor, by buying his property, even at a full price, and receiving a conveyance of it, does a wrong to the creditor for which he should answer by having the property subjected to the creditor's demand. He who gives or sells property, and remains in the possession and enjoyment of it, as before the conveyance, has the credit of being owner of such property, and it should be subject to his debts contracted while he so appears to be owner. A man who falsely represents another as being the owner of a thousand dollars' worth of land, knowing it to be false, and thereby induces a stranger to credit the person so represented, should, if necessary to prevent the creditor's losing, pay him one thousand dollars.

To enforce these principles, to prevent creditors from suffering by their violation, was the object of the statute of 13 Eliz., c. 5, and is the object of that part of section 2 of our statute for the prevention of frauds and perjuries, which relates to creditors As to the relief of creditors these statutes are co-extensive; each makes void conveyances made with "intent" to defraud creditors; they are declarative only of the common law, which, as now understood, would, without the statutes, have effected all that can be effected with them. The statute of Elizabeth, as to the relief of creditors, has, from its enactment, in courts both of law and equity, uniformly received a most liberal construction, notwithstanding it subjects the committers of the forbidden fraud to a prosecution for a penalty. Cowp. 343; Roberts on Frauds, 14; 1 Fonb. Eq. 260, 267; 1 Cranch, 316. Our legislature, when they, in 1824, by section 10 of the act "for the punishment of certain offenses therein named," subjected the maker of a conveyance to defeat creditors to a criminal prosecution, did not intend to prevent the courts from giving as extensive relief to creditors, under the statutes of frauds and perjuries, as they had before given or could have given, had not the act of 1824 been passed. When relief is
124] given against frauds, even of the grosser kind, *the perpetrators are frequently in no worse, and sometimes in a better con-

dition than they would have been had not the fraud been committed. That the perpetrators of such frauds should be really punished, and thereby such frauds be prevented or made less frequent, was probably the only object of the legislature. Before the statute of Elizabeth, the courts in England held that a voluntary conveyance to a stranger, made by a person indebted at the time, was void as to creditors; after, they held that a conveyance to a child by a parent, if the parent was at the time indebted was void, not only as to debts contracted before, but also as to those contracted after. 1 Fonb. Eq. 260, n. a.

In the case of Russell *v.* Hammond, 2 Atk. 13, Lord Hardwicke says, that he "had hardly known of one case, where the grantor had been indebted at the time of the conveyance, that the conveyance had not been deemed fraudulent."

In the case of Reede *v.* Livingston, 3 Johns. Ch. 500, Chancellor Kent, after a laborious examination of the English cases, says, that "the conclusion to be drawn from them is, that if the party be indebted at the time of the voluntary settlement, it is to be presumed fraudulent in respect to such debts, and no circumstances will permit those debts to be affected by the settlement, or repel the legal presumption of the fraud." It is even doubtful whether, by the English decisions under the 13 Elizabeth, a voluntary conveyance to a child of land worth one thousand dollars, when the parent at the time owned land of the value of four thousand dollars, if the father at the time owed only fifty dollars, would not be deemed fraudulent and void, and the land liable for the debts contracted by the parent, after he made the gift to his child.

The law abhors fraud; a statute relieving against it must be liberally construed. When we adopt, in substance, an English statute, the construction before given by their courts to their statute is, in general, to be considered as adopted; but when the statute is declarative of the common law, and when the construction would here be injurious, arising from a settled difference in the mode of doing business, and from the situation of property, it becomes the duty of the court *not to follow them in their construction. [125 To hold here, that the parent being indebted at the time he makes a voluntary conveyance to his child, is conclusive evidence of fraud, such as can not be rebutted or resisted, no matter how small the debts, or how small the property conveyed to the child, or how

ample the property still retained by the parent to pay his debts, and for his own and his family's support, is going too far; farther than the Supreme Court of the United States went in the case of the Lessee of Hinde v. Longworth, 11 Wheat. 199.

The security of the creditor of ordinary diligence does not require it, and it would be injurious to the debtor and his family, and to society. A parent is under obligations to his children as well as to his creditors; those to the creditor are paramount, and to be preferred; but when his circumstances are such as to enable him to discharge both, it is his duty to do so; hardly any man, especially the diligent and prosperous, can say at any time, "I owe not a dollar." Shall he be prevented from making the most reasonable provision for a child, unless by way of marriage settlement, until he can say so?

In England, parents before the marriage of their children, but with respect to it, convey their lands to them by way of marriage settlements. The contemplated marriage takes place; their courts decide that the marriage is a valuable consideration, and that the creditors of the parent, neither prior nor subsequent, can follow the lands into the hands of the children. Marriage settlement is almost unknown here; the donations to children are generally after, presently after the marriage—not connected with it; the marriage has made it necessary. To force prudent parents into marriage settlements, to discharge their duty to their children, would be giving no additional security to creditors, but the reverse; it would do society no good, but an injury.

That the conveyance of land to a child was in consideration of love and affection, and that the parent was indebted at the time he made the conveyance, is evidence of fraud as to creditors; but it may be repelled by showing that the debts were small, and that the property retained by the parent was amply sufficient to pay 126] them; that he was in prosperous *circumstances, and not embarrassed, and that the gift to the child was a reasonable provision for him, according to his and the parent's circumstances. 11 Wheat. 199.

The defendant, Christopher Myers, on March 31, 1819, made the bond to Brice, the complainant, conditioned to convey to him a lot in Zanesville, or to pay to him fifteen hundred dollars within five years. Myers did not convey the lot nor pay the money, and Brice has recovered a judgment against him on the bond for one

thousand nine hundred and forty-five dollars and costs. Myers has no other property than an annuity for his life of one hundred dollars. After the bond was made, on April 17, 1820, Myers conveyed in fee simple to his sons, the defendants, Isaac, Jacob, William, and to his son-in law the defendant Hahn, in several parcels, as described in the bill, twelve hundred acres of land; the consideration expressed in each deed is one thousand dollars. At the time the deeds were made, each grantee made a bond to C. Myers, to pay to him and his wife during their lives, and to the survivor during his or her life, an annuity of twenty dollars; this was the only valuable consideration for the deeds. C. Myers at the time owned no other lands, and but little other property, except an equity of redemption in a tract of land, which, in 1822, he released to satisfy the mortgage. C. Myers states, in his answer, that in the spring of 1819, when he acquired the twelve hundred acres of land, he estimated the lands he gave in exchange for them at nine thousand dollars. Hahn, in his answer, states, that at the time the deed was made to him for his one hundred and twenty-nine acres, it was not worth more than the annuity he agreed to pay; but there is no evidence in support of the answer. When a child claims to hold land as a purchaser for valuable consideration against a creditor, a suspicion of fraud arises, and more proof of its payment, and of its adequacy is required, than where the purchaser is a stranger. Alexander Harper's deposition proves that C. Myers, when he obtained of Brice the twelve hundred acres for a farm, said that his object was to obtain a larger quantity of land to divide among his children, to give each a farm. C. Myers in his answer states that this was his object. It is manifest *that the advancement of the children, and not the annuity, [127 was the object of the conveyances. Love and affection is the only consideration that the defendants can set up. The defendants' counsel do not insist on any other. To rebut the presumption of fraud which arises from these facts, the defendants contend that the fifteen hundred dollars contained in the bond, on which the judgment at law has been obtained against C. Myers by Brice, was secured by mortgage, when the deeds were made by C. Myers to his sons and son-in-law. This, it is admitted, does not appear by the bond or by the mortgage, but it is urged that it is proved by parol testimony, and that this testimony should be admitted by the court.

Alexander Harper testifies, that in the spring of 1819, Brice and C. Myers came to him and told him that they had agreed to exchange lands; that Myers was to convey his farm in Muskingum county to Brice, for which Brice was to convey to Myers twelve hundred acres, in Licking county, and that they wished him to draw the deeds; that while he was drawing the deeds, as he thinks, Brice sold to Myers about seven hundred acres, a part of the same tract out of which the twelve hundred acres were taken; he does not remember the price; Myers made his notes and a mortgage to Brice for the purchase money; he also made a bond to Brice, to convey to him a lot in Zanesville, estimated at fifteen hundred dollars, the price of two hundred acres of the land sold; that the house and lot belonged to Michael Sockman, who was then in Illinois or Indiana; that two hundred acres of the land was intended for Sockman, and when the lot was conveyed to Brice he was to release the mortgage as to two hundred acres of the land; that there was some conversation as to Brice executing a bond to release the two hundred acres, but the arrangement was effected without.

William Stanberry testifies, that he saw Brice and Sockman together, and that Sockman offered to convey the lot in Zanesville to Brice, if Brice would release from the mortgage two hundred acres of the land. One objection made to it by Brice was that he had assigned the notes and mortgage to the Granville Bank.

Brice, in answer to an interrogatory filed by the defendants, 128] *states that Sockman, in the fall of 1820, told him that he would not convey the lot in Zanesville unless Myers would pay him fifteen hundred dollars or give him the best lot he purchased of Brice, he thinks lot No. 10; that he recollects no other conversation with Sockman; that Winchel was a part owner of the lands which he, Brice, sold to Myers and exchanged; that, on settlement with Winchel, he assigned to him the notes and mortgage of Myers in payment for his part of the land.

C. Myers states, in his answer, that the purchase of Brice was of six hundred and thirty-four acres; that for the price of four hundred and thirty-four he gave his notes—for two hundred acres, the remainder, he gave the bond for the lot in Zanesville, or fifteen hundred dollars; that to secure the payment of the purchase money, he gave a mortgage on the whole six hundred and thirty-four acres; and that Brice agreed to release two hundred acres on the convey-

ance of the lot in Zanesville; that when he released the equity of redemption to Ransom, the holder of the notes and mortgage, he thought all was settled. The other defendants, except Hahn, all state that the purchase of C. Myers was of six hundred and thirty-four acres, and that the mortgage was for the price of four hundred and thirty-four acres only. Hahn states that the mortgage was for the same.

Sockman states, in his answer, that he offered to convey the lot in Zanesville to Brice, about a year after the bond was made, if Brice would release two hundred acres from the mortgage, according to his contract; that Brice refused, alleging that he had assigned the mortgage to the Granville Bank and had no control over it; from all which it is apparent, that whether the fifteen hundred dollars was secured by mortgage depends on the testimony of Harper. C. Myers, in his answer, states, in general terms, that the purchase money was secured by mortgage. From Sockman's answer, and the depositions of Stanberry, and the answer of Brice, nothing is to be gathered but that Sockman offered to convey the lot in Zanesville, if two hundred acres were released from the mortgage, and that Brice refused, and assigned as one reason, says Stanberry, that he had assigned the mortgage to the Granville Bank.

*Brice sold to Myers three hundred and thirty-four acres [129 of land, at about seven dollars and fifty cents per acre. The agreement was made, Harper thinks, in his presence. Notes were given for the purchase money of four hundred and thirty-four acres, payable in one, two, three, and four years, and a mortgage made on the whole six hundred and thirty-four acres, to secure the payment of these notes. For the price of two hundred acres of the land, the remainder of the six hundred and thirty-four acres, Myers gave the bond to convey the lot in Zanesville, or to pay fifteen hundred dollars in five years. Harper says, in general terms, that the notes and a mortgage were given to secure the purchase money; that two hundred acres were intended for Sockman, who owned the lot in Zanesville; that two hundred acres were to be released from the mortgage on the conveyance of the lot to Brice; that there was talk of Brice making a bond to that effect, but it was otherwise arranged.

Why was this bond of Myers' not referred to by the mortgage, if its performance was intended to be secured by the mortgage?

Why was it not stated, in the condition of the bond, that the lot was not to be conveyed or the money paid, unless at the same time Brice released from the mortgage two hundred acres of land? Why was not a separate bond taken from Brice, as was talked of, binding him to make the release? That the mortgage does not include the fifteen hundred dollars or refer to the bond, that the bond does not require the release of the two hundred acres on the conveyance of the lot or payment of the money, that the bond of Brice to this effect was not executed, the result of mistake or fraud, is neither proved nor urged. The mortgage was taken to show how far the parties agreed to lien the land—the bond to show on what conditions the lot was to be conveyed. They talked of a bond to affect the mortgage and the bond for the Zanesville lot, but it was not executed—it was not agreed to. Some other arrangement was made; what that other arrangement was we know not. If Brice declined making a bond at the time he received the mortgage and title-bond, which would have materially affected them, on what principle can the court construe the mortgage and title-bond as though he had signed the bond for the release? The interest of parties in their contracts is as important and sacred as their interest in their land, and is carefully guarded against the legislature by all our constitutions. If when made they are so sacred, we must as scrupulously avoid making them for the parties as varying them when made. Unless the agreement were drawn contrary to the intention of the parties at the time by mistake or fraud, and that clearly proved, this court can not interfere. Sug. Vend. 93, 116, 117; 1 Pet. 13, 15; 1 Johns. Ch. 127; 3 Stark. Ev. 100–105. The parol testimony must be rejected, and we must hold that it is not proved that the fifteen hundred dollars was secured by mortgage, or that Brice was bound to release the two hundred acres from the mortgage on receiving the conveyance of the Zanesville lot.

130] *

It is contended again that the demand of Brice is hard and unjust; that he has already got back, in payment for the land, the whole of the land and one hundred acres of the twelve hundred acre tract; that by mistake the mortgage covered one hundred acres of the twelve hundred tract.

There seems to have been a mistake in the mortgage of one hundred acres of the east part of lot No. 10. This, though, was known to C. Myers when he released the mortgage to Ransom for

the notes, secured by the mortgage; he says he thought the whole matter was then at rest, but he does not state or prove that the bond for the Zanesville lot was even mentioned at the time. Why was not a release of it taken, or some reference to it made, if it was then intended to be discharged?

The lots of land in the deeds and in the mortgage are some of them called for by their number, and not by the quantity; hence, perhaps, the error in the quantity as described. The deeds of C. Myers to the other defendants convey eleven or twelve hundred acres; they call for less than a thousand acres. Yet that the mortgage to secure the payment of little more than two-thirds of the price of about six hundred and thirty-four acres should have been drawn for land, in the mortgage said to be seven hundred and seventy-one acres, and that the bond for the payment of fifteen hundred dollars should have a penalty of five thousand dollars, are circumstances that must awaken suspicion of unfairness; *the [131 penalty has done no harm—the mortgage with full knowledge has been released.

In 1819, when C. Myers purchased the land of Brice, the currency of the country was an unsound one, incumbered by all the notes of the local banks; they were abundant and had depreciated at least twenty-five per cent., but were passing at the sums for which they were made; the value of land and other property was estimated in reference to this currency. At the time C. Myers released the mortgage in 1822, the depreciated notes of the local banks had ceased to circulate. The price of land and other property had in consequence fallen from thirty to fifty per cent. at least. Few who purchased land on a credit in 1819 could, in 1822, sell it for two-thirds of the purchase money. Myers appears to have purchased for speculation. The lot in Zanesville with which he was to pay fifteen hundred dollars in five years, was the property of his son-in-law, Sockman. The payments which fell due in 1820 and 1821 were not made. In 1822, when the third payment became due, the lands had fallen, and the mortgage was released in satisfaction of the three first, and also of the last payment to become due in 1823. If the land had raised in value, so that Myers could have paid for the whole, by the sale of two hundred acres in 1822, whereby he could have gained the four hundred and thirty-four acres by his trade with Brice, the court could not have re-

lieved Brice; we can not, therefore, as lands have fallen, relieve Myers.

It is stated in the answer of C. Myers, that Brice for a time had possession of the lot in Zanesville. There is no evidence of this fact; if there had been, the court would have ordered Brice to have credited the value of the net rents to Myers. For it is a principle without exception, that when a party comes into chancery for relief, he must do justice, or relief will be refused. 1 Fonb. Eq. 259.

Sockman admits, by his answer, that when he purchased of Hahn the land conveyed to Hahn by C. Myers, he knew of the bond on which the judgment of Brice was obtained, and of the consideration for which the land was conveyed to Hahn, and the circumstances attending the exchange and purchase of lands by C. Myers of Brice.

132] *Upon the whole, the court are of opinion that the deeds of C. Myers to his co-defendants, his sons and son-in-law Hahn, and the deed from Hahn to Sockman, are fraudulent and void, as to the judgment of Brice, and so declare them.

The court ordered, that on failure of C. Myers, by a fixed day, to pay the amount of the judgment, and the costs of this suit, that the land conveyed by C. Myers to each defendant should be separately valued, and the valuation returned to the next Supreme Court, that the court might then order such part of each tract to be sold as should appear necessary. It was suggested that the lands were valuable, and that arrangements would be made between the parties.

Lessee of G. N. Hunt v. John McMahan.

The occupying claimant law of Ohio is constitutional.

This cause came here from the county of Butler, on exceptions to the report of commissioners appointed to value improvements.

The plaintiff recovered in ejectment, and, on the motion of the defendants, commissioners were appointed to value the land and

the improvements under the statute of the state. The land recovered was one hundred and six acres and two-thirds. The commissioners certified that the improvements consisted of seventy acres of cleared land, divided into fields by worm fences, containing about fifteen thousand one hundred and thirty rails; a two-story frame house, twenty by twenty-five feet; a loge abin, two wells of water, two log corn cribs, a wagon shed, and one log barn, which they valued at one thousand one hundred and twenty-eight dollars and thirty-five cents, subject to no deduction for waste. The land in an unimproved state, they valued at six hundred dollars. The defendant excepted to the valuation on the single ground that the statute, commonly called the occupying claimant law, was unconstitutional.

*PENDLETON, in support of the exceptions. [133

CORWIN and COLLET, contra.

Opinion of the court, by Judge WRIGHT:

After a verdict of guilty in this case, the defendant applied, under the occupancy claimant laws of Ohio, to have the value of his improvements assessed by three freeholders. The report of these freeholders being filed, it is objected to by the plaintiff because the occupying claimant law contravenes section 8, of article 8, of the constitution of Ohio, which is in these words: "The right of trial by jury shall be inviolate."

The counsel for the plaintiff rely upon the decision of the Supreme Court of the United States in the case of Green v. Biddle, 8 Wheat. 1. That case determined that the occupying claimant act of Kentucky of 1812 impaired the obligation of the compact, between that state and Virginia, of 1789, and so infracted the provision in the constitution of the United States prohibiting the passage of a law impairing the obligation of contracts. The very able judge who delivered the opinion of the court in that case, in reasoning upon the occupying claimant laws of Kentucky, does indeed determine it to be incompetent to the State of Kentucky, or even the judges of the United States court, by rule, to introduce into the courts of the Union changes affecting a fundamental right incident to remedies in its courts of law, but he leaves un-

touched the question how far the legislative power of the state was adequate to effect this change in its own courts.

The occupying claimant laws of Ohio came under the consideration of the same court in the case of the Bank of Hamilton v. Lessee of Dudley, 2 Peters. In that case the court concede that the state has the power to secure to claimants of lands their possessions until paid for lasting improvements made by them on the land, but denies the power of the state, by its enactments, to "change radically the mode of proceeding prescribed for the courts of the United States, or direct those courts in a trial at com-
134] mon *law to appoint commissioners for the decision of questions which a court of common law must submit to a jury." Such a proceeding the court suppose would conflict with the clause in the constitution of the United States, which declares that "in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." It appears to us obvious that the provision of the constitution just quoted applies only to the courts of the United States, and does not prescribe a rule of practice for the courts of a state. In that case, the courts expressly determine that "the inability of the courts of the United States to proceed in suits at common law in the mode presented by the occupant law of Ohio does not deprive the occupant of the benefit intended him. The modes of proceeding which belong to courts of chancery are adapted to the execution of the law, and to the equity side of the court he may apply for relief. Sitting in chancery, it can appoint commissioners to estimate improvements, as well as rents and profits, and can enjoin the execution of the judgment at law until its decree shall be complied with;" and that on the chancery side of the United States courts the law can be executed. We understand this decision as affirming the constitutionality of the law so far as it provides for the relief intended to the occupant, but that it is incompetent for the federal courts under the constitution of the United States to afford the relief or ascertain the damages, on the law side of those courts, by commissioners instead of a jury. We think the constitution of Ohio interposes no such restriction upon the action of this court.

This opinion renders it unnecessary to inquire what a jury is in the meaning of the Ohio constitution, or whether it consist of twelve, or any other number of persons. The late Judge Wilson, in his Lectures on Law, 2 vol. 300, defines a jury to be "a convenient

number of citizens, selected and impartial, who, on particular occasions, or in particular causes, are vested with discretionary powers to try the truth of facts on which depend the property, the liberty, the reputation, and the lives of their fellow citizens." Mr. Jacobs, in vol. 3 of his Law Dictionary, 566, says a jury is "a certain number of men sworn to inquire of and try a matter *of fact, and declare the truth upon such evidence as shall [135 be given them in a cause, and they are sworn judges upon evidence in matters of fact." We are not aware that we shall profit in the pursuit of this inquiry further.

The constitution of Georgia, in article 61, declares "the trial by jury shall remain inviolate forever." In the case of Cooper v. Telfair, 4 Dallas, 16, the Supreme Court of the United States decided that an act of the legislature of Georgia of attainder and confiscation against one of her citizens was constitutional, though no jury intervened. If this be law, little difficulty will be experienced in awarding to the Ohio legislature, under our constitution, power to pass the occupying claimant law. Indeed we are unable to discover wherein the law of Ohio conflicts with the constitution of Ohio. Were we to decide otherwise, there is a series of legislative acts, commencing with the organization of our government and continuing to this time, that we should be compelled to declare void. We allude to enactments providing juries in cases of forcible entry and detainer, for the trial of the rights of property, for the assessment of damages where private property has been taken for public use, for inquiry in cases of idiocy, lunacy, etc. Upon the principle assumed all these are contrary to the constitution, and all rights acquired under them are void and of no effect. To sustain such a decision we should have unquestionable authority and a firm conviction that the constitution has been clearly violated. The case in hearing is not one of that kind.

It follows from this opinion that the objections filed to the report of the commissioners in this case are overruled.

136] *JOSEPH WESTERHAVEN v. JACOB CLIVE.

The fact whether a constable's official bond was received or rejected, may be proved by parol, where no written entry is made concerning it.

The admission of evidence pertinent to any point in a case is not error, though the court admit it for a wrong reason.

Constable's official bond, given after the expiration of ten days from his appointment, is not void. Such a bond found in the office is not, therefore, a matter of record.

THIS cause came before the court upon a writ of error to a judgment of the court of common pleas of Hocking county, and was adjourned here for decision by the Supreme Court sitting there.

The original case was this: An action of debt was brought in the name of the State of Ohio, for the use of Jacob Clive, against Joseph Westerhaven. The declaration counted upon a bond made by Joseph Westerhaven and others, on May 2, 1826, conditioned that if Simon Decker should well, truly, and faithfully discharge the duties of constable for the township in the year 1826, etc. The declaration averred that Decker held the office of constable for the year 1826; that on May 20, 1826, an execution was put into his hands, in favor of Clive, against one Burt; that Decker refused and neglected to levy upon property to make the money due on the execution; that for this default Clive recovered judgment against Decker, upon which execution had issued and return made that nothing could be found to satisfy the same.

The general issue of *non est factum* was pleaded, with a notice. This notice set out that Decker was elected constable, but did not give bond within ten days, whereupon the trustees appointed another person to the office of constable; that if defendant ever did give bond for Decker, it was with other obligors than those named in the bond declared upon; that the bond declared upon never was delivered to the clerk of the township, and by him received as defendant's bond; and that the same never was approved of by the trustees. Verdict and judgment for the plaintiff.

At the trial the plaintiff offered in evidence the record of the judgment, Clive *v.* Decker, which was objected to, but received. Defendant excepted.

Plaintiff then gave in evidence the township record, containing the subjoined entries: "April 16, 1826. Ordered, that Horace

Stone and Samuel Alexander be appointed and *serve as [137 constables for said township the present year, and that they be notified of their appointment by the township clerk."

"May 2, 1826. Simon Decker gave bond as constable, in the sum of six hundred dollars, with Joseph Westerhaven, T. W. Claxton, W. Wallace, and J. W. Coffinberg as sureties—bond filed the same day."

Whereupon the defendant offered to prove by the individuals who were trustees at the time, that the bond declared upon was never accepted by them, but absolutely refused and rejected. The plaintiff objected to the admission of this testimony, and the court rejected it. The defendant excepted.

The evidence being closed, the defendant moved the court to instruct the jury, that the bond not being given within ten days after the election, and a new appointment having been made, there being no evidence of the reappointment of Decker, he could not be held a constable, and the bond was not obligatory; that the township record showed that Wallace was a surety, in the bond accepted, and his name not being on the bond declared upon, it did not appear that the bond declared on was the one on which Decker acted as constable.

The court refused to give all the instructions asked for, and the defendant excepted. The errors assigned were predicated upon these different exceptions.

OLDS, for plaintiff in error, cited 3 Ohio, 487; 2 Ohio, 348.

H. STANBERY and HUNTER, for defendant in error, cited 14 Mass. 167.

Opinion of the court, by Judge HITCHCOCK:

Sundry errors are assigned in this case:

1. That the court of common pleas erred in admitting, under the state of the pleadings, in evidence of the breach, *is the [138 declaration assigned, the record of a judgment in favor of said Jacob Clive against Simon Decker.

It is not denied that this record was a proper item of evidence, but the objection is that it was admitted for an improper purpose.

This objection is not well taken. If evidence is proper for any purpose in a case, it should be admitted, and it is immaterial what

reasons are assigned by the court, when it is received. That this record is proper evidence to show the amount which the plaintiff is entitled to recover, provided he has any right, there can be no doubt. If, in the charge to the jury, the court had directed them that this was an item of evidence to prove the breach in the declaration assigned, and this had been spread upon the record, the question which the counsel for the plaintiff in error wishes to raise, would have been fairly presented to the court. But nothing of this kind appears. Upon this assignment, then, we can not reverse the judgment.

2. That the court erred in rejecting the testimony of the trustees, to prove that the bond declared upon had been by them disapproved and rejected. The law requires that a constable shall give bond with sureties, to be approved of by the trustees of the township. This law ought to be complied with, but we are not prepared to say, that if a bond be delivered to a township clerk, and by him filed away, that such bond would not be obligatory, without proof of its having been approved by the trustees. When, however, a bond is presented to the trustees, and by them rejected and disapproved of, it is clear that such bond can not be held obligatory. The sureties are discharged. Can this disapproval or rejection be given in evidence? The court of common pleas rejected this evidence upon the principle that the official acts of the trustees must be proved by the record of the township alone. We do not believe that these records are of that absolute verity, that any person shall be estopped to show the truth, in consequence of any matter which they contain. We are of opinion, therefore, that in rejecting this evidence, there was error.

3. That the court erred in refusing to charge the jury as requested by the plaintiff in error. And,

139] *4. That the court erred in charging the jury that the bond itself became matter of record, etc.

There can be no doubt but that after the ten days had expired, Decker having failed to give bond, it was the duty of the trustees to consider the office as vacant, and appoint another person to fill the office of constable. This was done; but up to the time the bond in suit bears date, neither of the individuals thus appointed had complied with the law by executing bond. If, then, the trustees had accepted this bond, it would have been, on their part, a ratification of the appointment of Decker, and the security

would have been holden. The mere circumstance that the bond is executed after the ten days have expired is not sufficient to vitiate it. So far, then, as respects the first and third instructions of the court, we think they might well be refused.

As to the second instruction requested, it should have been given. From the township book, as shown by the bill of exceptions, it appears that on May 2, 1826, Decker gave bond as constable in the sum of six hundred dollars, with the same persons named in the bond now in suit, together with Wm. Wallace, as sureties. It can not, with propriety be said, that a bond found in the office of the township clerk, years afterward, became so far a matter of record as to control this entry of May 2, 1826.

In refusing the instruction stated in the second particular, and in declaring the effect of filing bond upon the entry of 2d of May, there was error. Judgment reversed.

D. McARTHUR *v.* A. KELLY AND M. T. WILLIAMS, ACTING CANAL COMMISSIONERS, HENRY NEVILLE, AND OTHERS.

The canal laws do not authorize the commissioners to compenesate those who may be injured, by appropriating lands of others, to be used without their consent. An attempt to make such an appropriation may be stayed by injunction.

THIS cause was adjourned for decision here from the Supreme Court of Pickaway county. The case made in the bill was this: The complainant alleged that he was owner of a tract of land, and in its actual possession and *occupancy, situate between the [140 Ohio canal, a certain feeder and dam and the Scioto river, the feeder being upon the land thus owned and possessed by the complainant. That the defendants, Neville and others, owned a mill on the Scioto river, a short distance below the land of complainant. That the defendants, with Kelly and Williams, acting as canal commissioners, threatened that, under color of an act of the legislature, March 8, 1831, they would erect a waste weir and dig a race to conduct water from the head race of the mill to supply it with water; that this waste weir and race defendants were

about to cut on complainant's land without his consent and against his will. The bill alleged that the acting canal commissioners had no authority, under the act referred to, to proceed in this manner. It made the act a part of the bill, and prayed an injunction, which had been allowed by a single judge out of term. The defendants demurred.

LEONARD, for complainant, cited 2 Johns. Ch. 162, 463; 7 Johns. Ch. 329, 332, 436.

OLDS and HUNTER, for defendants.

Opinion of the court, by Judge COLLET:

The bill states that complainant was seized in fee simple, and was in possession of a tract of land situated on the Scioto river, in the county of Pickaway; that the canal commissioners, to supply the canal with water, have erected a dam across the said river, which is abutted on the said land, and have constructed a feeder from said dam to the canal; that the feeder passes through said land; that the defendants, H. Neville, James Neville, and J. Cushing, are the owners of a mill on said river a short distance below said tract of land; that they have no right to abut a dam against said land, or to dig a mill-race on it, or in any manner to use it, or any part of it, to convey water to said mill, or for any other purpose; that neither the complainant nor any other person, who was authorized, ever consented or agreed that they should do so; that the defendants pretend that they, by virtue of 141] an *act of the legislature, passed on March 8, 1831, entitled "an act concerning the surplus water at the Scioto dam near Circleville," have authority to construct a waste weir in said feeder, and to dig a race from it to the head race of said mill to supply it with water without the consent and against the will of the complainant, although the weir and the greater part of the race, if constructed, will be on the said land of the complainant; that they *threaten*, without the consent and against the will of the complainant, to construct this waste weir and race for the purpose aforesaid; that they have no right or authority to do so. The act referred to by the bill is made a part of it. The bill prays an injunction, which was allowed in vacation. The defendants de-

murred to the bill, and moved to dissolve the injunction and dismiss the bill.

This act, which is a part of the bill, 29 Local Acts, 199, provides, that on the owners of Neville's mill releasing to the state all damages sustained by them, by the construction of the canal and supplying it with water from the Scioto river, that then the canal commissioners should construct in this feeder a waste weir of sufficient dimensions to pass off all the surplus water of the river, which can safely be made to pass into said feeder, over and above what can be safely made to pass along said canal below its junction with said feeder; and shall cause to be constructed a sufficient race from such waste weir to the point where the canal leaves the head race leading to the mill known by the name of Neville's mill, and shall permit all the surplus water as aforesaid to pass through said waste weir into said race for the use of said mill. This act further provides, that if the Supreme Court should determine that owners of mills on the Scioto river, who were injured by turning water from the river into the canal, could not recover damages for such injury, because the Scioto was a navigable stream, that then the canal commissioners should appoint appraisers, to ascertain the value of the water privilege, on which value, the owners of the mill should pay to the canal fund commissioners annually six per cent.; and if they failed to pay, that the privilege should be forfeited. That if the Supreme Court should determine that the owners of mills on the Scioto *river were entitled to damages for such [142 injury, and that the state had no right to pass into the canal more water than was necessary for the purposes of navigation on the canal, that then the value of this water privilege, and the injury which the owners of this mill would have sustained without it, by withdrawing from the river, into the canal, more water than was necessary for navigation, should be ascertained by appraisers appointed by the canal commissioners; and if the value of the water privilege was equal to the damages, that the owners of the mill should receive the difference from the canal fund. By the last section of this act it is provided, "that nothing in this act contained, shall be construed to affect, or interfere with the rights of any person or persons, through whose land said race may be constructed."

A demurrer admits the facts stated in the bill. Mc Arthur, then, must be considered as owning the land, against which the dam of the feeder is abutted, through which the feeder passes, where the

waste weir is intended to be erected, and through which a greater part of the race, if dug, will pass. Through this race, this mill is probably forever to be supplied with water—this, without any right or authority derived from McArthur, or from any source other than the act of the legislature of March 8, 1831, which declares that nothing in it shall be so construed as to affect or interfere with the rights of any. The entering on McArthur's land and digging this race, the subjecting it, forever, to the passage of this water, forever to be entered on as often and as far as may be necessary to cleanse and keep the race in repair, without the consent of McArthur, must undoubtedly affect and interfere with his rights. After this is done, will McArthur have that full and exclusive enjoyment of his land he before had? Can the Nevilles and Cushing acquire a right to pass water over the land of McArthur, without McArthur's right being thereby lessened or impaired? Their right to pass this water may, if acquired, be worth half their mill; must not Arthur be affected?

There being no provision in this act of the legislature, of March 8, 1831, for ascertaining the value of any land through which this 143] race might pass, contrary to the will of *the owner, and for its payment, makes it highly probable that the legislature did not intend that it should interfere with the rights of any without their consent.

We can not presume that the legislature would be unmindful of the constitution, which declares that "private property ought and shall ever be held inviolate, but always subservient to the public welfare, provided a compensation in money be made to the owner," art. 8, sec. 4; of the constitution of the United States, which declares that property shall not be taken "for public use without just compensation (amendment 5); of that fundamental principle of which our constitutions are only declarative, that when the government takes private property for public use, full compensation shall be made to the owner. The laws of nations require it. 1 Vat., sec. 244. To establish justice is the declared end of our government. Preamble to constitution of Ohio and United States. Before the owner can, without his consent, be deprived of his land for the public use, the legislature must declare by law that the public welfare requires it (1 B. C. 139), direct the mode of ascertaining its value, and provide for its payment. The mouth of the owner is closed, he can make no terms, the gov-

ernment will take it, and must have the value ascertained, and pay for it.

In the case of Gardner *v.* The Trustees of the Village of Newburgh and others, 2 Johns. Ch. 162, which was this: H. owned a farm near the village, on which was a spring, the water from which flowed in its natural channel from the farm of H. across the farm of Gardner, and supplied his farm, brick-yard, and distillery with water. An act was passed by the legislature of New York to authorize the trustees of the village to convey the water from the spring into the village for the use of the inhabitants. The act provided for the indemnity of H., the owner of the spring, and of another person through whose land the water had to be conveyed in passing to the village, but made no provision for the indemnity of Gardner. Chancellor Kent said that he "supposed the necessity of a provision for the compensation of Gardner did not occur to the legislature, or it doubtless would have been inserted; until, then, some provision be made for affording him compensation, it would be unjust *and contrary to the first prin- [144 ciples of government, and equally contrary to the statute, to take from him his undoubted and prescriptive right to the use and the enjoyment of the stream of water;" and he, to prevent it, granted an injunction.

The legislature, on March 7, 1831, the day before they passed this act, passed the act "defining the duties of supervisors of roads and highways;" by section 9 of that act they expressly authorize the supervisors to enter on lands near the road for materials to repair or construct the road, and, by section 10, point out the mode in which the value of any timber or stone taken and used for their purposes should be ascertained, and paid for. Seven days after, on the 14th of March, they passed the act for the opening, etc., of state roads; by section 17 they provide for ascertaining the injury which may have been done to any person by opening and making the roads, and for its payment. On the same day the "act for opening and regulating roads and highways" was passed; this provides for ascertaining the damages done to any one whose land should be taken for a road, and for their payment.

The legislature had these road laws under consideration when they were considering the act of the 8th of March. By providing in the road laws for the taking of property of individuals without their consent, and for the assessing its value and paying for it, while

in the other they declared that it should not be interfered with, and no provision is made for its valuation and payment, is shown, beyond a doubt, the intention of the legislature that it should not be taken.

It is contended that, to pay the owners of this mill the damages they have sustained by constructing the canal and supplying it with water from the river, the canal commissioners have a right to construct this race, and pass the water through it from the feeder, by virtue of the constitution and of laws before enacted by the legislature.

All the authority which the commissioners have to enter on, or take from the owner, without his consent, any land or interest in land, or materials for any work whatever, is given them by the "act to provide for the internal improvement of the State of Ohio 145] by navigable canals," passed *February 4, 1825, vol. xxiii. 50. By this act they are directed to enter on and take possession of the land, water, and materials necessary for the construction and making the canals navigable, and for no other purpose. The legislature, in 1820, "for the effecting a navigable communication" between the Ohio river and Lake Erie, appointed commissioners to locate a canal, and applied to Congress for aid in its construction. Vol. xviii. 147. In 1822 an act was passed, authorizing the governor to employ an approved engineer, to ascertain "the practicability of uniting the Ohio and Lake Erie" by "a navigable canal," and creating a board of seven commissioners, who were required to make estimates of the cost of making the canal or canals.

The legislature having ascertained that it was practicable to connect these waters by a navigable canal or canals, passed the act of February 4, 1825, to effect that purpose; and having by section 1 of this act, organized the board of canal commissioners, provided for their payment, etc., and giving them authority to employ such engineers and assistants as should be necessary to fulfill the duties imposed on them by that act, by section 2 enact, "that the said canal commissioners are hereby authorized and empowered in behalf of this state, and on the credit of the fund hereby pledged, to commence and prosecute the making of a navigable canal on the Muskingum and Scioto route so called, from the Ohio river at or near the mouth of Scioto river," etc., "to Lake Erie," etc., "and likewise a navigable canal on so much of the Maumee

and Miami line, as lies between Cincinnati and Mad river, at or near Dayton." Immediately after this formal grant of power to construct the two "navigable canals," by section 3 it is enacted, "that for the purpose of carrying into effect the object hereby contemplated, there shall be constituted a fund, to be denominated the canal fund, which shall consist," etc. By section 8 it is enacted, "that it shall and may be lawful for the said canal commissioners, and each of them by themselves, and by any and every superintendent, agent, and engineer employed by them, to enter upon, take possession of, and use, any lands, waters, streams, and materials, necessary for the prosecution of the improvements intended by *this act, and to make all such canals, feeders, [146 dykes, locks, dams, and other works and devices, as they may think proper for making said improvements; doing, nevertheless, no unnecessary damage." It is further provided by this section, that on application to the canal commissioners, by the owner of any land, water, or materials taken and appropriated for the purposes above mentioned, they should appoint not less than three nor more than five discreet persons, who, on oath, should appraise or estimate the loss sustained by the applicant; and that the canal commissioners should pay to the owner the damages assessed.

It was impossible for the state to have these canals constructed and made navigable without acquiring a water power, which might be rented or sold for hydraulic purposes for considerable sums, without affecting the navigation on the canals, or the rights of any.

The legislature, to enable the fund commissioners to raise funds for the construction of the canals, to enable the canal commissioners to contract for their construction, and to pay those whose land, or water, or stone was taken for their construction; and to insure the payment of the debt of the state, to be contracted by the fund commissioners, pledged for its redemption, by sections 5 and 6 of this act, a certain proportion of the ordinary revenue of the state, and all the net proceeds of tolls collected on the canals, and of the rents and profits of all privileges and works connected with the canals, which belonged to the state. The fund commissioners, by section 7 of this act, are required to pay to the canal commissioners such money as may be "necessary for, and applicable to the objects contemplated" by the act, which money the

canal commissioners are required to expend "in all such works as may be proper to make the said canals."

From the formal grant of authority to the canal commissioners, by section 2, to construct the navigable canals, from their being directed to expend the money of the state in making the canal, and from the whole act, it appears evident that the legislature intended to authorize them to go no further. The disposable water power is noticed only to lien it to the fund commissioners. The 147] canal *commissioners are not authorized to seize lands for mills or materials for their construction; they are not authorized to dispose of the water power for hydraulic purposes. When a part of the canal is navigable, they are required by this act to establish reasonable tolls, and provide for their collection, section 7, but they are not authorized to fix a price or rent on the disposable water power.

The canal commissioners are authorized by section 8 to pay those from whom they take land or water, or materials in constructing the canals, the value of the property taken. This, by the constitution, must be in money.

The legislature, neither by this nor any other act, have placed anything but money in the hands of the commissioners to pay any demand. How, then, can the commissioners, independent of the act, which is a part of this bill, convey this water to Neville's mill, to pay them the damages sustained by the construction of the canal.

If there was room for a doubt on this subject, it is removed by after legislation. By the act of February 7, 1826, "to provide for the increase of the canal fund, by the purchase and sale of real estate," in vol. xxiv. 58, the canal commissioners are authorized "to procure, by purchase or otherwise," a suitable number of acres of land, at every point adjoining the canals, where the surplus water can profitably be used for hydraulic purposes, provided no contract, made by the commissioners to purchase, should be binding on the state until approved by the governor. The commissioners are further authorized by this act to sell any lands which had been or might be given to the state for the benefit of the canal fund, and which were not adjoining the canal at points where the surplus water of the canal could be profitably used for hydraulic purposes. They are also directed to take all deeds, whether of gift or sale, for the benefit of the canal fund, to the state. If the

canal commissioners had been before authorized to seize on lands, without the consent of the owners, at the points on the canals where the surplus water could advantageously be used for the benefit of the canal fund, and had the legislature intended they should exercise that power, they would not have passed this law, with the provision that no contract to purchase *should be [148 binding until approved by the governor, without providing that no seizure of the commissioners, against the will of the owner, should be valid without his approbation. "By purchase or otherwise," certainly means by gift. There is no provision made for valuation or payment. By section 3 of the "act in addition to the several acts for the protection of the Ohio canals, and for other purposes," passed on February 28, 1830, vol. xxix. 380, the canal commissioners are authorized to order any surplus water, which can be spared from the feeders or from the canals, without impairing the navigation, for hydraulic purposes, to be sold with any land given to, or purchased by the state, on which to use such water. No mention is here made of any land which the state had seized for this purpose. By section 5 of "the act for the protection of the Ohio canal," passed February 11, 1828, it is enacted "that whenever, in the opinion of the board of canal commissioners, any water may be spared from any state canal, or works connected therewith, without injury to the navigation or safety of such canal, the board may order a sale of such surplus water, for a term of years, in their discretion, to the person who shall bid the highest annual rent therefor, provided that the same" shall not in any way interfere with the rights of individuals. By the last section of this act, the legislature expressly repeal all laws inconsistent with its provisions. This act expressly authorizing the canal commissioners to sell the water power of the state which can be spared from the canal, without affecting the navigation, requires them to sell at auction to the highest bidder, and prohibits them from interfering with the rights of any in disposing of that water. The act of February 28, 1830, extended the authority of the commissioners to the sale of the land sold or given to the state, to use on it the surplus water for hydraulic purposes; and to the sale of her surplus water power on her feeders and at her works, for improving the navigation of rivers, and required them, in all their conveyances of water power, to insert a condition that whenever the water was deemed necessary for navigation it

should be withdrawn, and the purchaser should either receive
149] back the purchase or have his rents remitted, as *should be just. By this act it is provided that all moneys arising from any contract made in pursuance of it, shall be paid into the state treasury, and form a part of the canal fund.

There is nothing in this act inconsistent with the provision of the act of February 11, 1828, that in no sale of water power by the commissioners should the rights of any be affected. The legislature, therefore, thought it not necessary to repeal it. They carefully provided for the rights of those who purchased, when the state should withdraw the water. There is nothing in this, or any other act, from which an inference can be drawn that the legislature intended that the commissioners should seize on the property of any, to sell or rent it, to pay the proceeds into the state treasury, or any department of it. On February 22, 1830, the legislature passed an act to authorize the canal commissioners to occupy and use part of the common of the town of Newark, in the employment of the water power of the canal, provided the town council consented. This was but six days before the passage of the act last mentioned. Here they prohibited the use of a town common for this purpose, without the consent of the town council.

Roads, streets, landing places on navigable waters, canals, and fortifications are necessary. For these and some other public uses, the public must have land. To enable them to command so much of it as is necessary to be used and occupied for public purposes, is almost the only reason for subjecting the land of the owner to be taken by the government. A nation might be reduced to so great a strait as to go farther. Spain had to cede Gibraltar for a garrison to her enemy, whether any part of it belonged to a private owner or not. The public must have materials, such as stone, timber, and gravel, to construct and repair her roads and canals. The very existence of the soldier, in time of war, may depend on the food, etc., to be taken from the inhabitants in his neighborhood; for these reasons, property, other than land, is subject to be taken by government. When taken, it is to be used by the government—the food for the hungry soldier, the stone and timber in making and repairing the public work. 2 Johns.
150] Ch. 166. When the state takes land *from the owner, as the constitution of the United States expresses it, for "public use,"

she takes no more, nor any greater interest in it than is necessary for the "public use." He who owns the land over which a road passes, still retains the fee subject to the public use. A tree left by the public is his—a quarry underneath is his; he may take the tree or work the quarry, if he does not thereby impair the road. When the road is discontinued, the whole interest of the land is again in him. Our governments have always acted on these principles. I know not that there was an instance of any state, distressed as they were, during the revolution, ordering the property of any individual to be taken and exchanged for arms or clothing, or food, for the unarmed, unclothed, and hungry soldier. Our legislature has never directed either the land or personal estate of any man to be taken and transferred to another, to pay him the damages he had sustained by a road being laid on his land. They have ever considered it as a debt to be paid in money. They have never directed him to go and take his neighbor's land, or timber, or stone, in compensation for what he had lost. They have never directed property of any kind to be taken from the owner, unless it, in kind, was wanted for public use. Considerable excitement sometimes existed, respecting the canals, but the legislature still kept this principle in view. To make the navigable canals, they directed the land to be occupied, and the materials to be used in their construction to be taken. For the using or selling their water power, for hydraulic purposes, they prohibited it.

Nations, to discharge their debts, levy taxes; for roads and other public purposes, requiring the occupation of land, they take land. No other course is just or consistent with the security of property, or the public welfare. Our state has pursued this course as the only constitutional one. She has not, either to relieve or increase the canal fund, or any other department of her treasury, directed the property of any one to be affected without his consent.

It is contended that the canal commissioners, having a right to construct waste weirs in the canals and feeders to pass off surplus water wherever they think it necessary; have a right to dig a race or ditch to convey from the weir the water which *passes [151 through it; that this lessens the injury to the owners of the land over which it passes; that, consequently, they have a right to erect this weir, and dig this race. The commissioners undoubtedly

have a right, and it is their duty, if they have the means, to construct waste weirs wherever it is necessary to preserve the canals or feeders, or to facilitate navigation on the canals; and to cut ditches from the weir where the water would otherwise overflow, and injure the adjoining lands, as it is the duty of a supervisor of a road to cut ditches to pass off water which would otherwise injure the road; but a supervisor who should cause the water to be conducted into the road, that he might enter on the land below, against the will of the owner, and cut a ditch to pass it off, would be a malicious trespasser, without excuse, who should pay most exemplary damages. Here, the water which is to be passed through this weir and race, is to be turned into the feeder for the express purpose, and no other, of being passed through this race and weir to supply Neville's mill. The feeder is to be overcharged with water, to make this weir and race necessary to the preservation of the canal; more water is to be passed along the feeder to the weir than "can safely be passed along the canals" below the feeder. It is very clear that on this ground the defendants can not be justified.

On sales of water power or land the commissioners are required by the general laws to have the proceeds paid into the state treasury for the canal fund, which is a department of the treasury. The proceeds of the water power are liened for the discharge of the canal debt by the act of 1825. They are not authorized to dispose of it to persons who have been injured by the canal, to pay them for their unliquidated damages. The legislature have, in this case, made the contract; this act is nothing more than a contract between the state and the Nevilles and Cushing, by which the state agrees with them, that on their releasing to her all damages which they have sustained by the construction of the canal, etc., she will dig this race and construct the waste weir, and forward through the feeder and weir into the race the water for the mill, if it can be done without affecting or interfering with the 152] rights of any. If there are rights which will *be affected by this race, the getting them in by the Nevilles and Cushing is a condition precedent to calling on the state to construct the weir and race. The canal commissioners, as agents of the state, are required, in executing the contract, to interfere with the rights of none. Now, to subject the state to the payment for any right which may be affected is contrary to this act or contract, and

unjust. The state agreed to be at the cost of digging the race, constructing the weir, keeping up the dam, and forwarding the water through the weir only, and not to that of getting any right necessary to convey the water to the mill, or to be subjected to any damage for doing so, but provided that she would not. Every light in which we can view this subject manifests that the commissioners had no right to construct this race without the consent of McArthur.

It is contended that the injury to McArthur will be trivial; that it will not be grievous; that, therefore, this court will not interfere by injunction. The bill might have stated the length of the race, or of that part of it which passes through McArthur's land. It states that the dam is abutted on McArthur's land; that the weir and the greater part of the race will, if constructed, be on McArthur's land; that the race is intended ever to be occupied for the use of the mill. If this land of McArthur, between the feeder and the river, was of little value before the construction of the dam and feeder, after this construction it becomes of considerable value. It is valuable in proportion to the value of the water power, and to the necessity to use this water power on or through this land. The water power is of as little value to the owner, without land to use it on, as the land can be without the water power; and it would consequently be as unjust, and an injury as grievous, to force the owner to part with his land as to force the owner of the water power to part with it. Suppose at this weir McArthur owns one hundred feet, through which this water must pass; the Nevilles and Cushing own the land between that and the river, fifty or one thousand feet; they, having purchased the water power of the state, can they use McArthur's land without his consent to convey the water to theirs, and then say to McArthur, we owning the water power and the land below, your land is of *no value to you; your injury is nothing; to us, [153 though, your land is of immense value—without it our water privilege is worthless? If the court by injunction prevent persons from cutting timber, to the injury of the land upon which it is growing; tenants from pulling down houses, from draining fishponds, or from cutting down ornamental trees, or from plowing meadow where the lease forbids the plowing (1 Mad. Ch. 143–149), how can it refuse an injunction in this case, where the land of McArthur is to be taken from him forever, so far as is necessary

to keep up the race and pass this water? 1 Fonb. Eq. 29; 2 Johns. Ch. 162.

The case of Jerome *v.* Ross, 7 Johns. Ch. 315, in which the chancellor refused an injunction, differed materially from this; that was a simple trespass of almost the least injurious kind, the taking stone to erect a dam from a cliff of rocks, in which, and in the neighboring cliffs, the quantity was such as to make them of little value; and their removal did not diminish the value of the cliff. It was like taking a winter's fire-wood for a family from the fallen beech and sugar-tree and tops of fallen and decaying oaks of a thousand acre tract of unimproved woodland. In this case a permanent appropriation of the land of McArthur is intended. The legislature, in the contract with the Nevilles and Cushing for this water power, have carefully guarded the rights of McArthur, as we have seen; they are now endeavoring, at the expense of the state, by color of this contract to prostrate these rights. It is very clear that this objection can not prevail with this court.

It is contended that the bill should have stated that the release to the state had been executed, and that the canal commissioners had commenced the weir or race, or that preparations were made for its commencement; that the statement that they "threatened" to construct the weir and race is not sufficient to authorize the injunction. An injunction prohibits the doing something which would injure or endanger the rights of the complainant, as the causing nuisances, or committing trespass of certain kinds, or the assignment of a note, or the payment of money. If the court had evidence that the defendant intended to commit the wrong, before 154] its commencement, and that he had power *to do it, they could no more refuse the writ to prevent its commencement than after its commencement to stop its progress. Why should the court? There are many cases in which, if the court could not issue the writ until the wrong was commenced, it would be of no avail, as to prevent the assignment of a note, opening of a mill-dam, or taking down a house. And in this case the canal commissioners, with the force in their employ, might not allow sufficient time after the commencement of the work until it was finished to have an injunction applied for, allowed, and served before its completion. The bill states that the defendants "threaten" to dig this race, which is confessed by the demurrer. On proof of the defendants threatening to do the wrong when it appears that

they have the power, the court issue this writ. 1 Mad. 138, 147–149; 2 Mad. 216; 2 Har. 131.

It was not necessary to state in the bill that the release to the state was made. It is made the duty of the defendants to have it executed; its execution may be presumed from their threat. Whether the release is executed or not, the injury would be the same to McArthur, and the defendants are equally unauthorized to inflict it. Upon the whole, the court are clearly of opinion that the motion to dissolve the injunction must be overruled. The defendants had leave to answer.

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EDWARD KING *v.* JOHN KERR'S ADMINISTRATORS.

Covenant of warranty, until eviction, passes to heir or assignee.

The holder of a covenant of warranty, at the time of eviction, may maintain a separate action against every intermediate warrantor, which he may prosecute to judgment, but he can only obtain one satisfaction. The amount he can receive, is actual damage sustained, including costs paid, with the costs of the several suits.

To sustain an action on the warranty, it is not necessary to give notice to the warrantor that the ejectment is brought upon which the eviction is had.

Where, after judgment in ejectment, the defendant claims the benefit of the occupying claimant law, under which the case is settled, actual eviction is not necessary to sustain an eviction on the warranty.

The rule of damages is the actual loss to the warrantee, when ascertained under the occupying claimant law.

THIS case was adjourned from the county of Ross, and came before the court upon an agreed state of facts. It was an action of covenant upon a warranty in a deed of conveyance made by Kerr, in his lifetime, December 30, 1807, to M. Baldwin, for a lot in the town of Chillicothe, in which deed the consideration expressed was two hundred dollars. This lot, by intermediate conveyances, all containing covenants of warranty, came to the plaintiff, King, *by a conveyance dated November 4, 1817, from Marcus [155 Heylen and wife; consideration expressed, two thousand eight hundred dollars. The possession had passed with the conveyances to King, against whom James Miller and wife brought an ejectment, and recovered judgment for the lot upon an independ-

ent and superior title. King claimed the benefit of the occupying claimant law. Upon the return of the commissioners appointed to make valuation, Miller and wife elected to take the valuation put upon the ground, without improvements, being three hundred and fifty dollars, which, upon the order of the court, was paid to them by King, and they released to him their title. Subsequent to the recovery in ejectment against King, he had sued an action of covenant against the executrix of Heylen, his immediate grantor, upon which no execution had been issued or compensation had. The questions presented for decision on this state of the case were, can the action be maintained? And if so, for what amount?

LEONARD, for the plaintiff, cited 1 Roll. 521; 1 Inst. 384, a; 1 Ves. 572; 4 Mass. 352; 1 Camp. 244.

G. SWAN, for defendants, cited 4 Halstead, 139; 7 Johns. 259, 376; 11 Johns. 122; 1 Ohio, 386; 5 Johns. 120; 3 Term, 587; 2 Saund. 177; 13 Johns. 336; 1 Mass. 464; 3 Bibb, 175; 1 Marsh. 370.

Opinion of the court, by Judge COLLET:

The covenant of warranty in a deed conveying land, or any interest in land, is an undertaking by the warrantor, that on the failure of the title which the deed purports to convey, either for the whole estate or for a part only, by the setting up a superior title, that he will make compensation in money, for the loss sustained by such failure of title. It is commonly, in express terms, extended to the heir and assignee of the grantee, but this is immaterial. This covenant is not broken until the grantee, his heir or assignee, is evicted from or disturbed in the enjoyment of the premises, or a part of them, by the setting up of a superior, or 156] paramount *title. It is like the covenant of quiet enjoyment in a lease. The covenant of warranty, as respects the grantee, is not merely a personal covenant, for the breach of which he, or his executors or administrators, only could sue; but it has respect to the land, is a real covenant, and until broken, passes with the land, to the heirs of the grantee; or if the land is conveyed or assigned to the assignee, and when broken, the heir or assignee injured by the breach can, in his own name, sustain an action against the

warrantor. Co. Lit. 384 b, 385 a; 4 Kent Com. 459; 5 Cow. 138; 1 Conn. 248. The court believe it settled, that all covenants in deeds for the conveyance of lands, which have respect to the title, and which were not broken when the land descended to the heir or passed to the assignee, are inherent or real covenants, and attend the land; and that on a breach happening, the heir or assignee injured thereby, could sue the warrantor, his executor or administrator, for the recovery of damages. In the case of Adm'rs of Backus *v.* McCoy, 3 Ohio, 218, 222, which was an action to recover damages for a breach of the covenant of seizin, in a deed made by McCoy, the court determined that when a grantor was in possession of the land, claiming it in fee simple, at the time he made the deed, that the covenant of seizin was not broken as soon as made; that in such a case, it was not broken until the grantee, his heir or assignee, was evicted, or disturbed in the enjoyment of the premises, but was a real covenant, and as well as the covenant of warranty, descended with the land to the assignee, and that the heir or assignee, when evicted, could sustain an action for a breach of it. This objection to King's recovery can not prevail.

It is objected to his recovery, that he has a judgment against the representatives of Heylen, on the covenant of warranty in Heylen's deed to him for these premises, for the damages he claims of Kerr's representatives in this action. Kerr, for the consideration as stated in his deed, of two thousand dollars, conveyed the premises, with a covenant of warranty, in fee simple, to Baldwin. The title conveyed by Kerr to Baldwin was passed by several intermediate conveyances, each with general warranty to Heylen, and by *Heylen to King, whereby King became the assignee of [157 Heylen and of Baldwin, and of each grantor through whom the premises passed from Baldwin to Helyen. With the premises, the covenant of warranty of Kerr, and of each of the others, passed to and centered in King, as though they had each been made with him personally. That eviction or disturbance of King in the enjoyment of the premises, which was a breach of the covenant of warranty of Heylen, was a breach of the warranty of Kerr, and of each of the others, whereby each became liable to be separately sued on his several covenant, for the same damages which each for himself had undertaken to pay.

As in a joint and several note to pay a sum of money on a cer-

tain day, or on the happening of a particular event, if the money is not paid on the day or on the event happening, the payee may treat the contract as the several undertaking of each, and sue at the same time each maker separately, and recover judgments against each, or may sue them each in succession, and obtain a judgment against one, then sue another and obtain a judgment against him. The judgment against one is no bar to the action against another; nothing is a bar but actual payment according to the undertaking as by the note. Or as where a promissory note passes by indorsements through several hands, each indorser, by his indorsement, guaranties or warrants the payment of the note by the maker; and if it is not paid when it becomes due, the contract of each indorsee is violated, and the holder can sue each at the same time for the amount of the note, or in succession. Imprisonment of one, on a *ca. sa.* at the suit of the holder, will not be a bar to an action by him against another. The undertaking was that the money should be paid; nothing else can, without the consent of the holder, make him whole. So here (for in principle the cases do not differ), King might have sued all the warrantors at the same time or in succession. A judgment against one unsatisfied is no bar to a suit against another. Nothing but payment of the damages sustained can, in this respect, bar his action. To pay is the covenant of warranty. 1 Conn. 248; 5 Cow. 138. King can have but one satisfaction; on that being actually made, then, on 158] payment of the costs, *all further proceedings would be stayed so far as King was to be benefited by the actions. If these covenants have been broken, it is commendable in King to prosecute the representative of the first warrantor; if he can obtain from him compensation for all the injury he has sustained, there can be no further litigation on the subject, unless it is about the costs of the judgment against the administrators of Heylen.

It is not necessary to sustain this action, that notice should have been given by King to the defendants of the commencement of the action of ejectment against him by Miller. No such averment is found in the precedents of the declarations in this action, as there would have been if notice was necessary. It is prudent to give the notice; it in some cases enables a plaintiff to recover on less testimony. 2 Saund. on Plead. and Ev. 631. This objection of the defendant can not be sustained.

It is objected to King's recovery that he has not been evicted;

this can not prevail. It is a general rule that, to sustain an action on a covenant of warranty, an eviction by process of law must be shown. The Supreme Court of Massachusetts admits of exceptions. 4 Mass. 348; 1 Big. Dig., title Cov., K. 4, 5. In an action on a covenant in a deed against incumbrances, no eviction is necessary; but the plaintiff may show that he has, by paying it off, got it in, on which he shall recover what he has fairly paid for it. If he could not thus protect himself, and preserve his right of action against the warrantor, he would have to buy in the incumbrance and lose it, or suffer the whole or a part of the premises to be sold by the officer to a stranger to satisfy the incumbrance; to be sued and regularly evicted by execution, although the incumbrance was due and liquidated, and not one-tenth of the value of the premises. The covenant of warranty includes the covenant against the incumbrances. Why should the eviction, in such case, when it is so manifestly injurious to both parties, be anywhere required in the action on the covenant of warranty? Be this as it may, Miller has, by a paramount or superior title, recovered a judgment in ejectment for the premises against King. King remains in possession, and has got in the title of Miller, not by a private *arrangement between him and Miller, but by con- [159 forming to the provisions of the occupying claimant laws (22 Stat. 448), and that not without being injured by the failure of the title derived from Kerr. Justice, and the interest of both warrantees, and the manifest intention of the legislature in enacting the occupying claimant laws, all require that this action be sustained.

The occupying claimant laws were enacted to promote the settlement and advance the improvement of the country, by giving assurance to the settler in the woods, who had reasonable grounds to believe that he had a good title to the land on which he settled, that if that title should fail, the person who by his superior title entered into the enjoyment of the fields which the settler had cleared, the orchard he had planted, and the houses which he had erected, should do him justice, by paying him for that labor and expense of which the successful claimant reaped the benefit. These laws provide, that on the recovery of a plaintiff in ejectment against a defendant who has such evidence of title as is required by the statute, either party may, by motion to the court, have commissioners appointed, to value all improvements on the land, made by the defendant, or by any person through whom he

derived title, deducting for waste and now for rents; and to assess the value of the land without the improvements. The plaintiff in ejectment can not put the defendant out of possession, until he has either paid him for the improvements or offered to convey to him the land, and he has refused to receive, and pay its value without the improvements.

The rule by which damages are ascertained in this action, where the whole of the premises are lost by the failure of the title, is the same as in an action on the covenant of seizin, the consideration received by the warrantor for the premises, and interest. 3 Ohio, 221; 4 Kent, 462–465.

This rule is adopted as the one most likely to do justice between the parties. It is the rule in most of the United States. In a country long settled, where the value of real property varies but little in twenty or forty years, whether this, or the value of the premises on eviction, is the rule, this, in general, is ascertained without cost or dispute. In this state, where real property is ris-
160] ing fast in value, the *value on eviction would be ruinous to the warrantor, and, in cases to which the occupying claimant law applies, would be unjust.

The warrantor covenants or agrees, that on failure of the title, he will pay the loss sustained; hence, to assess the damages at more is unjust; he covenanted to pay no more; to assess them at less, would be unjust and injurious to the warrantee.

When the title fails for a part only of the premises, as for one-tenth in value, the party recovers but one-tenth of the consideration and interest. 3 Ohio, 221, 222; 4 Hals. 143–148; 8 Pick. 455.

Interest is not recovered when the premises have been occupied by the warrantee, and he has not accounted, nor is accountable, for the rents and profits. It would be unjust. He who buys a farm, or house and lot, agrees to part with the use of the consideration forever, for the use of the farm or house and lot forever. As long as he has the use of the farm or house and lot, so long should the seller have the interest of the consideration.

A. sells to B. a farm for one thousand dollars; B. receives for it a clear rent of sixty dollars a year, for forty years, when his title fails, and he has to account to the claimant for four years' rent. A. should refund to B. the one thousand dollars, and four years' interest; it would be unjust to give B. forty years' interest. The

title of A. enabled B. to enjoy the premises thirty-four years. 4 Kent's Com. 462; 9 Johns. 324; 13 Johns. 31.

A., by a claim for dower in the premises, which is paramount, has it assigned, the premises not dividing, by an annual rent of thirty dollars; at the end of the first year, the warrantee pays her the thirty dollars, when she dies; he will recover of the warrantor the thirty dollars, and costs taxed against him in the proceedings for dower. The costs were incurred in defense of the warrantor's title. 13 Johns. 51; 4 Bibb, 220; 14 Johns. 89; 4 Kent, 442. The thirty dollars, costs and interest from the payment, is all the injury sustained.

When the commissioners, under the occupying claimant laws, value improvements, and the successful claimant pays *the [161 defendant for them, the warrantor, when the improvements were made by him, in this action must have credit for them. The spirit and policy of the occupying claimant laws, and justice, require it. In this case, suppose the improvements all made by Kerr; that they had been valued at one thousand six hundred and fifty dollars, after deducting the rents received by King; that Miller had paid King the one thousand six hundred and fifty dollars, and put him out; King would recover only three hundred and fifty dollars, the balance of the consideration of two thousand dollars received by Kerr for the premises. King had received the rents; Kerr had paid for them, by having them deducted from his improvements. If the improvements had been a part made by Kerr, a part by King, in assessing damages their relative value to the whole sum recovered by King for them would have to be ascertained, and interest apportioned according to the charge on the improvements. 3 Bibb, 167.

In this case, King has not lost the whole of the estate which he derived from Kerr in the premises, by the recovery of Miller. He has, by virtue of Kerr's title, retained the improvements, whether they were made by Kerr, or any other assignee of Kerr, before they came to King, or by King. Miller's title, by the proceedings under the occupying claimant law, has been reduced to an incumbrance of three hundred and fifty dollars, which King has paid off, together with the costs of the ejectment and proceedings under the occupying claimant law. This three hundred and fifty dollars, and these costs, are the damages sustained by King, which, with interest

from the time he paid them, is all he should receive, or the warrantor pay. Their covenants extend no further.

Not to give King this, would not only be unjust, but it would in some cases prevent the occupying claimant from purchasing in the paramount title, and subject the warrantor perhaps to the double loss of the value of the improvements made by him, and to the return of the whole consideration which he received for the premises.

It is agreed by the parties, that final judgment should be rendered at this term, without an inquiry of damages. The three 162] hundred and fifty dollars, and interest on it from the *time it was paid by King to Miller, and the costs of the ejectment, and of the proceedings under the occupying claimant law, with interest on these costs from the time they were paid by King, must all be added together, and the sum thus produced the court assess as the damages of King, for which sum, and the costs of this suit, judgment must be entered.

JAMES TAYLOR v. THE MIAMI EXPORTING COMPANY AND OTHERS.

A stockholder in an incorporated bank may sustain a bill in equity against the corporation, the directors, and other stockholders, upon allegations of fraudulent practices, depreciating the value of the stock, suspending banking operations, refusing cash payments, and withholding dividends; and in such bill the complainant may join individual stockholders with the corporation, may pray for an account of stock and funds, and for restoration of whatever may have been fraudulently withdrawn from the common stock.

THIS case was adjourned here for decision from the county of Hamilton. The bill charges that in the year 1803, the Miami Exporting Company were incorporated and organized, and that, before the year 1818, the complainant became the owner of two hundred shares of the stock, at the price of one hundred dollars per share. And it is alleged that on July 14, 1818, he gave a note to the company, payable in ninety days, for three thousand dollars, and pledged his whole stock as security for the payment, for the recovery of which a suit is pending in favor of the company. It is further alleged, that the whole stock is retained, and that for a long time no dividends have been paid to him.

The bill proceeds to charge that the president and directors of the company have greatly mismanaged its concerns, so as to destroy its credit, and render it unable to pay its notes when demanded, and that it had ceased to do business as a bank. And that on September 22, 1818, they passed a resolution, made known only to a few, authorizing the transfer or liquidation of stock in payment of debts due the bank from stockholders. It then enumerates the stockholders who made transfers under the resolution, and the amount of debt and stock thus liquidated by each, all of whom are made defendants. The amount of stock thus liquidated by *the [163 payment of debts under this order, up to October 2, 1820, is charged to be one hundred thousand seven hundred and seventy-six dollars and eight cents.

The bill further charges that on May 8, 1821, another order was made for the transfer of stock for the payment of debts by the stockholders, under which a number of stockholders, who are named and made defendants, transferred stock to the amount of forty-six thousand one hundred and nine dollars and ninety-six cents.

The bill then states that the whole number of shares sold, before the transfers under the resolution of 1818, was five hundred and fifty-nine thousand nine hundred dollars, upon which actual payments were made to the amount of four hundred and seventy-nine thousand six hundred and forty-five dollars and thirty-one cents.

The bill further charges that William Barr, who is made defendant, on May 21, 1821, subscribed and paid for six hundred shares of stock of the company, in the names of individuals stated, one hundred shares in his own name, and one hundred in the name of Samuel Patterson, John Sterret, David Griffin, James Riddle, and Samuel Perry, each. And that on the 5th of June of the same year (1821), the board of directors, of which Barr, Sterret, Perry, Griffin, and Riddle were members, passed a resolution to take back the said six hundred shares of stock, and pay to Barr the original price of sixty thousand dollars. And it is charged that the purchase of the stock was a fraudulent act, in which the directors concurred, to decide an election for directors, which was held between the time of sale and repurchase.

The bill prays that the stock liquidated or transferred, in the payment of debts, may be set up in equity as subsisting stock to

bear a share of the profit and loss of the whole concern. It prays, also, that the debts discharged by the stock may be set up, and that the stock purchased by William Barr, and sold again to him, may be set up, and that the company may be decreed to make a final settlement of all its business with the stockholders, or that it may be decreed to go on with its business in the regular manner, and declare and pay the stockholders their dividends. And in case of final settlement, it is prayed that the company account to 164] the *complainant for his stock and dividends, deducting the amount due upon the note named in the bill. There is, besides, a prayer for general relief.

To this bill some of the defendants answered and some demurred. And some of the defendants demurred generally, and some upon the ground of being improperly made parties.

HAMMOND and WORTHINGTON, for complainants, cited 1 Ves. & Beame, 226; 5 Cranch, 90; 17 Ves. 315; 2 Term, 204; 2 Johns. Ch. 390; 5 Mass. 230; 15 Mass. 505; 3 Mason, 308; 19 Johns. 456; 5 Pet. 672; 2 Kent's Com. 239; 2 Cranch, 127; 15 Johns. 358; 5 Conn. 560; 3 Barn. & Ald. 1; 4 Wheat. 518.

STORER and FOX, and N. WRIGHT, for the defendants, cited 1 Ves. & Beame, 157; 2 Id. 330; 3 Id. 180; 1 Jac. & Walk. 572; 2 Term, 199, 346; Mitford Pl. 21; Coop. Pl. 27, 163; 4 Wheat. 50; 4 Bro. Ch. 165; 2 Ves. Jr. 46; Coop. Eq. Pl. 30; 6 Johns. Ch. 160; 15 Ves. 10; 1 J. & W. 572, 574; Swa. 495; 1 Ven. 117; 2 P. Wms. 310; 14 Ves. 245; 1 Johns. Ch. 366; 5 Com. Dig. 19; 3 Burr. 1266; 1 Cranch, 167; 5 Johns. Ch. 377; 5 Mass. 230; Yel. 190; 2 Term, 513; 4 Term, 199.

Opinion of the court, by Judge WRIGHT:

Two questions are presented for the consideration of the court:

1. Whether the bill, in any aspect, presents a case proper for the interference of a court of chancery?

2. Whether any of the defendants have been improperly made defendants?

As to the first question, it is not my purpose to go into a detailed examination of the numerous authorities cited at this time. If the case made in the bill is one under which facts might be proven, entitling the complainant to any relief, the demurrers can

not be sustained. The bill is not artificially or precisely drawn, and the case is one of some doubt and difficulty. It claims, among other things, to be relieved against the fraudulent acts of the directors and several of the stockholders of the bank, and for an account. *Matters of trust and account are within the un- [165 disputed jurisdiction of a court of equity.

Judge Story, in the case of Wood et al. v. Deeman et al., 3 Mason, 310, in discussing this subject, says, "It appears to me very clear, upon general principles, as well as the legislative intention, that the capital stock of banks is to be deemed a pledge or trust fund for the payment of the debts contracted by the bank. The public, as well as the legislature, have always supposed this to be a fund appropriated for such purpose. The individual stockholders are not liable for the debts of the bank in their private capacities. The charter relieves them from personal responsibilities and substitutes the capital stock in its stead. Credit is universally given to this fund by the public as the only means of repayment. During the existence of the corporation it is the sole property of the corporation, and can be applied only according to its charter; that is, as a fund for the payment of its debts, upon the security of which it may discount and circulate notes. Why, otherwise, is any capital stock required by our charters? It the stock may, the next day after it is paid, be withdrawn by the stockholders without payment of the debts of the corporation, why is its amount so studiously provided for, and its payment by the stockholders so diligently required? To me this point appears so plain, upon principles of law, as well as common sense, that I can not be brought into any doubt that the charters of our banks make the capital stock a trust fund for the payment of all the debts of the corporation. The bill holders and other creditors have the first claim upon it; and the stockholders have no rights until all the other creditors are satisfied. They have the full benefit of all the profits made by the establishment, and can not take any portion of its funds until all the other claims upon it are extinguished. Their rights are not to the capital stock, but to the residuum after all the demands upon it are paid. On the dissolution of the corporation, the bill holders and stockholders have each equitable claims; but those of the bill holders possess, as I conceive, a prior exclusive equity. The same doctrine has been recognized by the Supreme Court of Massachusetts. 15 Mass. 505, 517, 522; 16 Mass. 9, 15. If I am

166] right in this, the principal difficulty *in this cause is overcome. If the capital stock is a trust fund, then it may be followed by the creditors into the hands of any person having knowledge of the trust attaching to it. As to the stockholders themselves, there can be no pretense to say that, both in law and fact, they are not affected with ample notice." In Gray v. Portland Bank, 3 Mass. 364, Lowell, Judge, considers this kind of corporation as a copartnership; and Sedgwick, Judge, says all the stockholders were partners. Blackstone says, 1 Com. 477, that "the general duties of all bodies politic may, like those of natural persons, be reduced to this single one—that of acting up to the end or design, whatever it be, for which they were created." I look upon it as clear, that all corporations are trustees for the individuals of which they are composed, and that those who act for the corporation and conduct its affairs, are trustees for the corporation and can not appropriate the corporation funds to their individual advantage, to gratify their passions or to serve any other purposes than those for the general interest of the corporation and its creditors. And when a by-law or resolution is adopted for the personal benefit of the individuals making it, chancery will control such exercise of power. 17 Ves. 315. Lord Redesdale, in Adair v. Shaw, 1 Sch. & Lef. 243, 262, says "trusts are enforced, not only against those persons who are rightfully possessed of the trust property as trustees, but also against all persons who come into possession of the property having notice of the trust." Upon this ground, assets in the hands of debtors, or misapplied by executors, or where there is collusion, are often vested in chancery as a trust fund. Chancellor Kent, in Attorney-General v. Utica Insurance Co., 2 Johns. Ch. 389, admits "that the persons who, from time to time, exercise the corporate power, may, in their character of trustees, be accountable to this court for a fraudulent breach of trust; and to this plain and ordinary head of equity the jurisdiction of this court over corporations ought to be confined." A corporation, being a trustee, is in part the same as an individual. 2 Ves. Jr. 467; 14 Ves. 252, 253; 2 D. & E. 171; 2 Bos. & Pul. 222; 11 East, 566; 4 Barn. & Cress. 461; 19 Johns. 456, 457. If this 167] *application was on the part of a creditor, properly so called, there would hardly be a question that this court had jurisdiction. I am not able to discover any good reason why the jurisdiction should be denied to a corporator against his trustee. The stock-

holders own the whole fund managed by the directors as their agents and trustees. Can these agents take fraudulent measures to depress the value of the stock they manage, buy it up at the reduced price, and then transfer it to the bank at its nominal value, pocket the avails of the fraud, render the bank insolvent, totally destroy the value of the stock of the remaining stockholders, and claim exemption from legal responsibility? Can they make corrupt bargains to elect directors who will divide the whole funds of the bank among themselves and set their co-stockholders at defiance? We can not believe the powers of this court so feeble as not to reach a case of such palpable fraud or unequal to the revision of so iniquitous a contract. Upon the case made in the bill, the complainant's interest has been destroyed by the acts of his agents fraudulently performed for their own exclusive advantage. Can not this court set aside such acts and place the rights of the complainant and his co-corporators where they would have stood if this fraud not been attempted? Again, if this corporation and directors were trustees and agents of the stockholders, can they not call them to account for the funds placed under their care, and to exhibit the state of the corporate affairs, in order to stay them from totally destroying the whole fund under their charge; or is it true that these extensive trusts and these trustees are peculiarly exempt from responsibility? We think they are not.

But it is said this court can not act, because the taking an account, or the restriction of the directors from further fraudulent acts, puts in issue the life of the corporation, and seeks administration of its effects. If that must be the effect of the account, or the setting aside these fraudulent transfers, the objection is well taken. An individual can not treat a corporation as dissolved for misfeasance or malfeasance till it has been called upon to answer the direct charge, and the law has adjudged the forfeiture. 2 Burr. 862. Suppose the account prayed for is had, does the making it put in *issue the life of the corporation, or inter- [168
rupt the exercise of the corporate functions? Clearly not. Suppose these transfers of stock should be found fraudulent, as alleged, be set aside, and the money withdrawn from the vaults of the bank through their instrumentality is replaced, would that interrupt the business of the bank or put in issue its life? So far from it, the restoration of this money improperly withdrawn from the

funds of the bank might impart to the institution new life and vigor. There is a vast amount of capital managed under various acts of incorporation, whose directors are under immense responsibilities to the public and to individual stockholders. It is only necessary to suppose it possible that these agents, like other men, can be unfortunate or dishonest to demonstrate the necessity of fixing a responsibility somewhere, or these agents and trustees will have power at their own will to divide the capital entrusted to their care among themselves, defrauding both creditors and stockholders. The action at law would not afford an adequate remedy. A court of law has no power to restore things fraudulently removed. Its whole power would be exhausted in the assessment of damages against the individual committing the wrong, and the satisfaction of the amount of his property or person, while the fraudulent act would remain operative to the injury of the principal. Besides, the matters charged in the bill lead us to suppose a case where to effect a particular fraudulent object, the stock might be so arranged as to elect a board wholly irresponsible in a pecuniary view, and altogether free from restraint. We think this court, in a proper case made, has the power to compel an account from bank directors to their stockholders, to restrain them from the gross misapplication of the stock intrusted to them, and to set aside their fraudulent acts, if injurious to their principals But it is again claimed that this power can not be exercised until the corporation is dissolved by legal means, or the expiration of its charter. If this be true, the power of the court does not extend to the preservation of the property of the individual, or the functions of the corporation from destruction. The chancellor has no power to prevent irreparable injury or waste of his funds; but the 169] corporator must first institute proceedings at law upon **scire facias* or *quo warranto* to repeal or destroy the charter, the very thing he desires to preserve. 5 Pet. 673.

The second point remains. Are these defendants properly made parties to this bill? If we are correct in the view we have taken, it would seem to follow, as a necessary consequence almost, that in order to the effectual exercise of the power of the chancellor, he must have all the parties to the fraud before him. The defendants are the bank in its corporate capacity, the directors and stockholders charged with the fraud. There is a peculiar fitness in bringing them all before the court, that if fraud is found,

the whole proceedings may be reviewed and the participants compelled to restore their ill-gotten gain to the coffers of the corporation.

Demurrer overruled.

THOMAS REYNOLDS AND OTHERS *v.* EXECUTORS OF C. ROGERS, DECEASED.

It is no ground of exception for a defendant, that the plaintiff offered evidence of matter he was not bound to prove.

Where matter of fact is submitted to the decision of the court, neither party can sustain a writ of error on their decision.

Notice under the statute respecting pleadings, must be of matter which, if pleaded, would bar the plaintiff's action.

Subsisting levy of an execution upon land is not a satisfaction of the judgment.

Suits against securities in writ of error bonds may be maintained without first proceeding against the principal.

Bond on a writ of error to a judgment on *scire facias*, reviving a dormant judgment, extends to the judgment revived.

Bond to prosecute a writ of error to effect, and abide the judgment, binds the obligors to pay the amount of the judgment.

In a declaration upon a writ of error bond, it is not necessary to aver that a writ of supersedeas was taken out by the plaintiff in error.

THIS was a writ of error adjourned here for decision from the county of Ross. The executors of Rogers brought suit in the common pleas against the plaintiffs in error, and declared upon a penal bond for four thousand two hundred and fifty-seven dollars, dated August 12, 1828; conditioned, that Thomas Scott and others had, on April 20, 1828, obtained writs of error and supersedeas to the common pleas of Ross county, to a judgment recovered by said executors against said Scott and others at June term, 1827, and if they should prosecute said writ to effect, and abide the judgment of the court thereupon had, then the obligation should be void. The plaintiffs aver, that at June term, 1823, in the lifetime of Rogers, he recovered judgment in said court against Scott, Rutledge, and Purden, for two thousand one hundred and twenty-eight dollars and twenty-five cents damages, and twelve dollars and fifty-two cents

costs; and that in June, 1827, Rogers having died, the judgment
170] *unpaid, his executors sued out a *scire facias* to revive said judgment, and obtained an order of revivor and for an execution in their names; and aver further, that at November term, 1828, of the Supreme Court, the said judgment of revivor was affirmed on said writ of error, with costs amounting to eleven dollars and sixty cents, yet the said Scott and others had not paid said judgment revived as aforesaid, nor said costs on the affirmance; and so said Scott and others did not prosecute said writ of error to effect, and abide the judgment of the court thereon, whereby an action hath accrued, etc. To this declaration, defendants below pleaded *non est factum*, and annexed thereto, under our statute, a notice of several matters in bar. 1. That by the terms of the bond and conditions, they only became bound for the judgment named in the condition, and not for the judgment mentioned in the declaration as recovered by the testator in June, 1823, and only liable for the costs on the *scire facias*, and on the writ of error. 2. That after the judgment of affirmance on the writ of error, and before the commencement of this suit, they paid the costs on the judgment of revivor, on the *sci. fa.*, and of the writ of error. 3. That the bond is void because not made in conformity to the statute. 4. That no execution had been issued against Scott et al., and "returned no goods or lands," in the matter aforesaid, but, on the contrary, property of theirs had been levied on sufficient for the payment and satisfaction thereof.

On the trial, the plaintiffs below offered in evidence the record of the proceedings on the writ of error described in the condition of the bond, showing the judgment in favor of their testator, the judgment of revivor, etc., as described in the declaration. Upon which writ of error, the plaintiffs in error assigned errors as well upon the original judgment in favor of the testator, as on the judgment of revivor. To the assignment of errors upon the original judgment in favor of Charles Rogers, the defendants in error pleaded in bar the statute of limitations, which being demurred to, was adjudged for them. Upon *in nullo est erratum* to the errors assigned on the judgment of revivor, the judgment was affirmed with costs. It was admitted by the plaintiff's counsel, that before this suit was
171] brought, execution had issued on the *judgment in favor of the executors as aforesaid, which had been levied, and remained levied on lands of the defendant, Purdon; and also, that no execution had been taken out and returned "no goods," etc., against the

principal obligors. The defendants below objected to this evidence, as insufficient on which to render judgment against them, under their plea and notice, and that upon the whole case judgment ought to be for defendants. The court overruled the objections, admitted the evidence, and gave judgment for plaintiffs; to which defendants excepted, and tendered a bill of exceptions. Upon this bill of exceptions general errors are assigned

R. DOUGLASS, for plaintiffs in error, cited 6 Cow. 585; 5 Cow. 27; 7 Cow. 468; 9 S. & R. 491; 3 S. & R. 93; 1 S. & R. 491; 4 Cow. 61, 80, 540; 4 Ohio, 175, 191, and cases cited from the circuit.

G. SWAN, for defendants in error, cited 13 Johns. 475; 10 Johns. 142; 20 Johns. 144, 746; 2 Bac. Abr., Wt. Error *sci. fa.* 474, F; 5 Com. Dig., Pleader, 725, B. 2; 20 Cro. Ja. 254; 2 Ld. Raym. 1072; 2 Saund. 344; 1 Salk. 322; 1 Johns. 45; 2 Johns. 248; Cro. Eliz. 391; 7 Johns. 423; 12 Johns. 207; 4 Mass. 402; 1 Ohio, 170; 2 Ohio, 409; 3 Ohio, 103; 1 Term, 279; 1 East, 662; 1 Salk. 276; Gilb. Ev. 101; 4 Peters, 84.

Judge WRIGHT delivered the opinion of the court.

The first question presented by this record is this: Was the evidence offered on the part of the plaintiffs below competent, and did it tend to establish the issue on their part? The evidence offered were several records, duly authenticated, which unquestionably conduced to prove the allegations in the declaration. It may be said that under the issue of *non est factum*, the plaintiffs below were not bound to give evidence of the proceedings upon the writ of error. It is true the plea only denies the execution of the bond; but the undertaking by the plaintiffs below to prove more than was necessary for them did not injure the defendants below. If the proof was only supererogatory, they can not object. *Their [172 right to complain attaches in no case, except the evidence admitted against them operated to their injury, and was objected to at the time of the trial. The bill of exceptions seems to be taken to the whole evidence, written and parol; and the counsel for the plaintiffs in error has made no specification of the part he deems inadmissible. His objections are to the effect of the whole evidence given under the issue. It is admitted to be the duty of the court to judge what written evidence proves. But the jury judge

of the effect of parol testimony. A party who substitutes the judges of the court for a jury, to ascertain facts under our law, can not object, before this court, the mistakes of those judges, in drawing conclusions, any more than he could the like error of a jury, in a case submitted to their decision. Carver *v.* Astor, 4 Pet. 180.

The next question to be considered is: Whether any evidence was admissible under the defendants' notice? The law of Ohio, vol. xxii. 220, ch. 61, and p. 290, ch. 67, provides, "that it shall be lawful for the defendant in any action to plead the general issue, and give any special matter in evidence, which, if pleaded, would be a bar to such action, giving notice with the same plea of the matter or matters so intended to be given in evidence." The notice required by this act must be of matter which, if pleaded, would bar the action. The pleader, in framing a notice, should ask himself: Does this matter constitute a legal bar? If so, how shall it be set forth to apprise my adversary of the real defense, and secure my client exemption from objections good on special demurrer? This form of pleading has not, in my opinion, improved the practice. It confers upon defendants nothing but security against the operation of a special demurrer, whose main office is to point out legal defects, and afford opportunity for their remedy by amendment. Whereas it exonerates a plaintiff from selecting one of the many matters he may wish to rely upon in his replication, and from exposing on the record the legal objections he intends to make, and leaves him at liberty, on the trial, to introduce proof of as many matters in opposition to the notice as he pleases, and to rely upon one or all of them; or the option of suddenly springing upon his opponent objections to the notice, 173] to the exclusion of all the *testimony offered, and of the entire defense. The notice in the case below would, in our opinion, be bad on general demurrer. It does not attain that certainty required to inform the plaintiff below of the intended defense, and so no evidence whatever was receivable under it. This opinion is sustained by the uniform decisions of the Supreme Court on the circuit, and by decisions in other states under similar statutes. Lawrence *v.* Kneis, 10 Johns. 142; Shepard *v.* Merrel, 13 Johns. 476; Chamberlaine *v.* Goshen, 20 Johns. 145, 746; Tate *v.* Welling, 2 Term, 537.

But suppose the notice, as to the fact of the levy of an execution, upon the original judgment, on lands of one of the judgment

debtors, which remained unsold, was sufficiently certain to constitute a bar, then the admission of the fact on the trial fully proves it, and the question remains: Would that fact bar the plaintiff's recovery? The case of Cass *v.* Adams, 3 Ohio, 223, is relied upon as fully establishing the sufficiency of such a bar. The question made in that case was, whether the taking of goods and chattels in execution, while the levy continued in force, should be deemed a legal satisfaction of the judgment, and constitute a bar to a subsequent suit. The court decided it was a bar. In the report of the opinion, this language is used, which is relied upon by counsel: "The arrest of the defendant on a *ca. sa.* is a satisfaction, though no money be paid; so is the levy of an execution upon goods or land, whilst the levy is in force and undisposed of." So far as the opinion speaks of a levy on goods, it is, upon the case before the court, and upon the point, decided; and, in the opinion of this court, is sustained by authority and reason. The taking the body of a defendant in execution is, in law, esteemed the highest species of satisfaction; and therein we concur with the opinion. The term *land*, introduced into the report, must have been inadvertently used. Neither the case then in hearing, nor the discussion, embraced a levy on land, and it could not have been within the intention of the court to decide that question. The distinction between a levy upon chattels and a levy upon lands is manifest, and may be sustained by authority. The reason why the first should be held a satisfaction of the judgment, while the second is not to be so held, will be obvious, *on slight re- [174 flection or examination. The possession of goods is changed by a levy on execution. They are taken from the defendant, and placed in the custody of the officer; and, in that way, are appropriated to the payment of the judgment. Such is not the case where land is levied upon. It remains in the possession of the defendant, and he continues in the perception of the rents and profits. 2 Ld. Raym. 1072; 2 Saund. 344; 1 Salk. 322; Cro. Eliz. 391; 1 Johns. 45; 2 Johns. 248; 7 Johns. 423; 12 Johns. 207; Ladd *v.* Blunt, 4 Mass. 402. In the latter case the precise point now made was decided. That able jurist, Chief Justice Parsons, in giving the opinion of the court in that case, says: "Where the debtor pleads satisfaction of the judgment (by extent of land) he must prove that the extent was legally made, seizin delivered, and a return of the extent." By the law of Massachusetts, land

is set off on execution to the acceptance of the creditor. The sheriff delivers seizin, and, until that is done, the title of the judgment debtor is not affected. In Ohio, neither the levy on land, nor the sale and conveyance under it, effects a transfer of the possession from the judgment debtor. The officer has no power to put the purchaser into possession. The law here leaves him to his ejectment, or other legal means of obtaining possession; and the judgment creditor has nothing to do with accepting the levy. His claim extends only to the proceeds. From this difference, it seems to us that the Massachusetts law affords a much stronger reason for maintaining that a levy should be held a satisfaction than the Ohio law. Another case has been decided in Pennsylvania, Patterson *v.* Swan, 9 S. & R. 16. That was a suit against bail, who pleaded a levy upon the lands of the principal as a satisfaction, but the court decided that such a levy was no satisfaction; and so that the plea set up no matter to discharge the bail. The authorities fully maintain the distinction between a levy on goods, and upon land, and establish the position that nothing short of a sale of land under a levy, can be held a satisfaction. We are unanimously of opinion that such is the law.

Five objections are urged to the declaration below: 1. The want of an averment that an execution had been issued upon the 175] original judgment, and returned no goods, *before suit brought. 2. That the bond refers only to the judgment of revivor in 1827, and has no relation to the original judgment in favor of Rogers. 3. That the condition of the bond is not framed according to the law of the state. 4. That the bond, as set out, is without consideration and void. 5. The want of an averment that the plaintiffs in error obtained a writ of *supersedeas* to the judgment of 1823.

First. The general assembly has provided (29 Ohio L. 108; 22 Ohio L. 115) that before suit is brought against the security, upon appeal or injunction bond, execution shall be issued against the principal debtor and returned no goods or lands sufficient to satisfy the judgment. And where joint judgments are rendered upon written instruments, and it be proven to the court at the time of the judgment that one or more of the defendants are bail for a co-defendant, the clerk shall certify which of the defendants are principals and which security, and shall issue execution, commanding the officer to make the money, first of the principal, and

only of the surety when there is not sufficient property of the principal to make the debt. 22 Ohio L. 114; 29 Ohio L. 108. It will be perceived at once that neither of these acts embrace the case at bar; and no provision has been made, within our knowledge, requiring execution on writ of error bonds before the surety can be sued, and none is cited to us. If the case at bar be one omitted by the legislature, as counsel urge, application should be made to that body, not to this court, to supply the omission.

Second. Does the condition of the bond refer to the original judgment? That was the only effective judgment in the cause. It was against that the defendants must have sought relief by the writ of error. The judgment of revivor had no other effect than to make the executors of Rogers parties to the judgment recovered by him in his lifetime, and to confer upon them power to enforce the execution of it. The judgment of revivor only gave life and force to the original judgment, which had become dormant by the death of the plaintiff. If the bond be held to extend to that judgment, the construction will carry it no farther than to embrace the only judgment there was in effect; that recovered by the testator and revived to his executors. How could *the judgment of revivor injure the defendants unless by [176 imparting life to the dormant judgment? The plaintiffs in error and the court so understood it. The plaintiffs assigned errors on both the judgments, and prayed for the reversal of both. Issue was taken on both, and judgment rendered on both issues. Does it lie with the plaintiffs in error now, after having sued their writ under the bond upon both the judgments, and compelled their adversaries to meet and defend both until the judgment is had upon the proceeding, to say he did not give the bond, the incipient step in the whole proceeding in but one of the judgments, and to limit its application to the only one which could never have injured him in any possible way except by acting upon the other? We think not. But if the Supreme Court, in the judgment it gave, did fall into error, we have no authority to correct their errors, nor has the court power to allow writs of error to itself.

Third. The objection of the want of conformity in the bond with the statute is not a new one. The statute, 22 Ohio L. 71; 29 Ohio L. 77, prescribes that the condition of the bond given on writ of error, shall be the payment of the condemnation money and costs, if the judgment be affirmed in whole or in part. The

condition of the bond in this case is that the plaintiffs in error shall prosecute their writ of error to effect, and abide by the judgment of the court thereon. The same objection was made in this court in Gardiner *v.* Woodyear, 1 Ohio, 170, and fully examined. It was decided in that case "that the bond in question (exactly like the bond in this case) contains precisely the very terms required by the earlier statutes in such cases, and which were interpreted by the court to subject the obligors to the same liability imposed by the existing bond and to no other. This interpretation was adopted from a clear conviction that such was the effect which the legislature intended the terms used should have. Because the legislature have not adopted more explicit terms, the court can not be warranted in deciding that the same terms, used for the same purpose, meant one thing in 1810 and another thing in 1820. It is, therefore, the opinion of the court that the condition is, in substance, the same as if it contained the express terms 177] now *required by the statute." With this decision we are satisfied, and the argument of counsel in that case, so zealously urged upon us as authority, however eloquent and able, can not be received by us as of more weight than the decision of the court. See also Barret *v.* Reed, 2 Ohio, 409; 3 Ohio, 103.

Fourth. Can the plaintiff in error avail himself of the objection that the bond is without consideration? It can not be necessary to waste time in reasoning to establish the position that at law a party is not permitted to set up the want of consideration in defense of a bond or sealed instrument. The objection has no foundation in law.

Fifth. This only remaining objection raises the question, whether it is material in a declaration on a writ of error bond to aver that the plaintiff in error had sued out a supersedeas to the judgment below? The statutes, 22 Ohio L. 70, and 29 Ohio L. 77, contain no provision requiring a writ of supersedeas to issue; though doubtless a writ might issue upon the application of the plaintiff in error. They do, however, contain a provision which authorizes the universal practice of proceeding on the writ of error without a resort to a writ of supersedeas; "that the writ of error shall not operate as a supersedeas," unless bond be filed. 29 Ohio L. 77. A party may prosecute his writ of error effectually without superseding the judgment he would reverse pending the proceeding, and rely upon the judgment of restitution on the writ of

error, and the process upon it to restore him to what he may have lost or may lose; or he may cause the writ of error to operate as a supersedeas by giving the required bond. The writ is solely for the benefit of the plaintiff; he may retain it or do without it at his own option. The pursuit of either course can not affect the obligation of the bond. Its validity depends upon the condition annexed by the obligors themselves on the prosecution of the writ of error to effect. This, we have already seen, involves the liability to satisfy the judgment and costs in case of affirmance. But were it not for the statute, the plaintiff in error on common principles could not reverse a judgment upon errors not shown to be to his prejudice, or for those committed by himself. In this case he makes not *even an attempt to show [178 that he has been prejudiced, and the omission complained of was one of his own. There is still another conclusive answer to this objection; it is the acknowledgment of the plaintiffs themselves, in the bond, that they had obtained "writs of error and supersedeas." This admission deliberately made, they are estopped from denying at this time. Carver v. Astor, 4 Peters, 83, 88, and the authorities there cited.

The judgment is affirmed with costs.

DANIEL L. NORTON v. JOHN BEAVER, H. CURTIS, AND OTHERS. | 5o 178 52 533

Court of equity has jurisdiction to enjoin sale on execution of real estate, where sale confers no title, but may cast a cloud on that of complainant.

Where judgment creditor's levy is not set aside, and a new levy made under section 16 of the execution law of February, 1822, his lien is not taken away as against a purchaser from a judgment debtor.

When a dormant judgment is revived, its lien against real estate is not so revived as to prejudice a purchaser from the judgment debtor, made before the judgment became dormant, but subsisting while it was so dormant.

THIS case was adjourned here for decision from the county of KNOX. It was a bill in chancery by Norton, who had purchased certain lots of land under execution to enjoin a sale under an elder judgment. The material facts of the case are as follows:

In November, 1819, Beaver recovered a judgment against S. C. Smith for three hundred and sixty-two dollars, and execution was sued out in December, 1818, and levied upon three hundred and twenty acres of land, appraised to one thousand dollars, and duly returned not sold for want of bidders. A *vendi. exp.* was issued to August, 1819, and was returned not sold; another to February, 1820, was returned the same. No further execution issued until after the lapse of five years. In June, 1826, the judgment was revived by *sci. fa.* The appraisement of the land previously levied upon was set aside and another *vendi. exp.* issued; a new appraisement was made, and a sale made to the defendant, Curtis, for two hundred and fifteen dollars.

In November, 1820, Norton, the complainant, purchased of S. C. Smith lot No. 115, in the town of Mount Vernon, for which he paid a valuable consideration and obtained a conveyance.

179] *In May, 1828, an *alias fi. fa.* was sued out upon Beaver's judgment, and levied upon the lot purchased by Norton. The bill was brought to restrain the parties from effecting a sale.

This case was argued in open court, by GODDARD for the complainant, and H. STANBERY for the respondent. The points made are noticed in the opinion of the court.

Opinion of the court, by Judge LANE:

In the case of the Bank of the United States *v.* Schultz, 2 Ohio, 495, this court decided unanimously, that the owner of land might call into action the power of a court of chancery to prevent its sale by execution, even where no title could be conferred. We concur in that decision.

The complainant asserts that the sale he seeks to prevent would confer no title, because he insists that by the statute of 1822, vol. xx. 75, the lien of Beaver's judgment is taken away, as well as to purchasers as to judgment creditors. This precise question came before the court in the case just referred to, and was not adjudicated upon account of an equal division of opinion among the then members of the court. The present members of the court unite in the conclusion that section 16 of that statute imposes no limitation upon a judgment lien, except in its operation upon other judgment creditors.

The evils which at that time required legislative interference, arose from the financial embarrassments that followed the termi-

nation of the war. Debtors resisted payment under the hope that time would add to the value of property; creditors hesitated to accept satisfaction in a currency of diminishing value. Purchasers are rarely found in a falling market. From these causes, judgment liens had accumulated upon the lands of debtors, that created most perplexing difficulties to creditors. Sales by execution were retarded by reason of the uncertainty of interfering claims. To remedy these difficulties, and to prevent senior judgment creditors from placing real estate beyond the reach of junior judgments without appropriating it in satisfaction of their own, the legislature, by this section of the law, assumed *to settle the privity and extent [180 of judgment liens. The protection of purchasers, by contract with the debtor, was no part of their object.

To carry into effect their intention, distinct provisions were made for different classes of judgment creditors. To such as had levied and made repeated efforts to sell, they offered the privilege of abandoning the old, and making a new levy, after which their liens should present no obstacles to junior judgment creditors, who were seeking to subject a portion of the debtor's real estate to the satisfaction of their judgments. On such as were content with a subsisting levy, the same restriction was imposed upon the extension of their liens to other parts of the debtor's lands, as if a new levy were made. In this alternative, although the persons from whom the operation of the lien is removed, are not expressly declared, we consider it a part of the same sentence as the former provision, and subject to the qualification before expressed in it. No reason is presented to us, why a creditor content with his levy should be more limited in his rights than he who makes a new one. We can not be persuaded that any such limitation was intended, when there was offered to the same creditor the privilege of the same alternative of making a new levy, and extending it over the same land, maintaining the lien to its full extent against all except senior judgments. We, therefore, can not adopt the position of the complainant's counsel, that, in this case, the lot purchased from the debtor, after the levy made, is exempt from the judgment lien.

The next position taken by the complainant, in support of his bill, is, that when, from the lapse of time, a judgment becomes dormant, the lien is extinguished.

By section 2 of the statute of 1815, in force when the judgment under consideration was rendered, the lien created is general in its

terms, and without limit as to its duration. Nevertheless, when the judgment becomes dormant, the means of enforcing the lien are suspended, because they necessarily slumber with the judgment. But when the judgment is revived, it is revived with all its incidents. There is no new judgment recovered on the *scire facias*, but the old 181] one is called into action. The form of execution *adopted in practice, requires the sheriff to make the money, for want of goods and chattels, from lands owned by the debtor at the date of the judgment. The statute declares that the sale shall vest as good a title in the purchaser as the debtor had, whilst the land was liable to the satisfaction of the judgment. So far as the debtor is concerned, the lien of the revived judgment exists in all its original force.

But it does not follow that the right of others acquired, or subsisting under the dormancy of the judgment, are subordinate to the revived lien. In a country where land is one of the most familiar and ordinary subjects of trade, the policy of the law does not favor liens which impose embarrassments on their transfer. The purchaser who acquires title to land at the time when no lien exists, or at a time when, by the creditor's delay, a once existing lien becomes dormant, appears to us to have an equity preferable to him who has indulged in delay. In treating with the debtor he has a right to rely upon the presumption that a dormant judgment is satisfied.

The lien of the creditor, at this time, is indefinite and contingent. It is not a subsisting interest in the lands, but a power to set up an interest that may never be exercised. He may prefer to enforce payment of his debt against other property, or against the person of the debtor. The purchaser has no means in his hands to guard against future dormant claims. It is, therefore, better that such sleeping creditors should sometimes lose their money, than that titles acquired in good faith, while they slumbered, should be rendered precarious. Besides, the judgment is at best but a security, always postponed to a specific lien, unless such lien be junior. 2 Pow. Con. 61; Amb. 252; 2 Ohio, 527. In this case Beaver's judgment is not the eldest lien, unless connected by relation with the lien of the dormant judgment. This relative connection, we think, ought not to be made at the expense of intervening rights.

No authority is produced which countenances the position, that the judgment creditor's lien is to be preferred to that of a *bona*

fide purchaser. The case of Ogden *v.* Arlington, 1 Mod. 217, only decides, that a tenant by elegit, after actual extent, has such an interest as may be cut off by fine, *and that before ex- [182 tent he has no such interest. The case of Erby *v.* Erby seems equally remote in its application. But the precise point has been adjudged in the Virginia Court of Appeals (2 Call, 103), and furnishes authority for our conclusion. We fully accord with the opinion there expressed, "that a different doctrine would raise the most vexatious embarrassments on the transfer of real estate, and would be contrary to the plainest principles of equity."

This view of the case is decisive of the controversy between the parties. It leads us to hold that Norton's title to the lot ought to be protected against the assumed lien of Beaver's judgment. The injunction must be made perpetual.

JESSE SPENCER *v.* EDWARD KING.

Case on facts. Equity does not correct errors in the proceedings of the court of law.

THIS was a suit in chancery adjourned here for decision from the county of Ross. The cause was heard upon bill, answer, and proofs, and arose upon the following contract:

"CHILICOTHE, *February*, 16, 1826.

"Memorandum of an agreement made between Jesse Spencer and Edward King, of the same place, witnesseth that whereas Jesse Spencer has this day employed Edward King in a suit of ejectment of Steele's Lessee *v.* Thomas Spencer's Heirs, which is to be carried by a writ of error to the Supreme Court of the United States, and if there determined against the said Steele, a new ejectment is to be brought. Now if the said King shall succeed in obtaining a judgment in favor of the lessors of the plaintiff in the Supreme Court of the United States, or in a subsequent suit in the Circuit Court of the United States, then the said Jesse agrees to pay said King five hundred dollars, and if he does not succeed, said King is to receive no fee for those services.

"JESSE SPENCER,
EDWARD KING."

"Attest: WM. ALLEN."

183] *The case of Steele's Lessee v. Thomas Spencer's Heirs, referred to in this agreement, was taken to the Supreme Court of the United States, and there the judgment of the circuit court was reversed. The reversal was upon a point collateral to the merits, and the opinion delivered decided the cause adversely to the complainant in this case, and he refused to pay King anything on the contract. Suit was brought and a recovery had at law. The bill sought to enjoin this judgment, alleging fraud or mistake in drafting the agreement, and charging that the true intent and meaning was that King was to receive nothing unless complainant succeeded in the object of the litigation with Thomas Spencer's heirs. This allegation the answer denied. And the court took upon themselves to decide on the proofs; the testimony is, therefore, not reported.

CREIGHTON and BOND, and MURPHY, for complainant.

G. SWAN, for defendant.

By the COURT:

The proofs, in this case, do not support the allegations of the bill, which are denied by the answer. No case of fraud or mistake is made out. The only witness present when the contract was made supports the answer fully. Upon reading his deposition, it seems to us impossible to come to any other conclusion than that the whole transaction was conducted with the utmost fairness. This conclusion is not affected by other proofs, as we understand them.

The counsel for the complainant have cited many authorities, as to the interpretation of contracts and the testimony admissible to explain them when written. But these can have no bearing in this court. The court of law was open to hear them, and a court of equity does not take upon itself to correct the errors of a court of law, if any are committed. In the present case, we do not perceive wherein the court of law erred. By the contract King was entitled to the stipulated compensation, upon either of two contingencies. If the judgment was reversed he was entitled; if

184] *the judgment was affirmed and he succeeded, for Spencer, in a subsequent suit, he would have been entitled. The first contingency occurred, and his claim to the stipulated sum became

perfect, unless the contract itself could have been impeached for fraud or mistake. That is not done here, and if it were so impeached in the trial at law, it does not appear to us; if it did we could not rehear the cause. The bill must be dismissed.

TRUSTEES OF CONCORD TOWNSHIP *v.* JACOB MILLER AND OTHERS.

Where trustees of township lease school lands, they execute a special power, and a declaration on such lease, must set out a case, wherein that power can be legally exercised, or it is bad on demurrer.

In suits by trustees of townships, it is safest to sue only in the corporate name.

THIS case came before the court by adjournment from the county of Champaign. It was an action of debt, and stood on the pleadings as follows:

James Russel, John Doggen, and John Daniel, who describe themselves trustees of Concord township, in Champaign county, declare upon a penal bond of two hundred dollars, dated the 3d of March, made to them and their successors in office, and aver that Philip Kenton, John Hall, and George Robinson, then were trustees, and that the plaintiffs have succeeded them in office. The condition of the bond is set out, and is that the obligors shall perform the covenants in a lease given by the trustees of Concord township aforesaid to John Burdett, deceased, on the northwest quarter of section 16, in said township, dated June 8, 1811. Plaintiffs aver that by the lease mentioned, John Daniel, Joel Feeson, and Abner Harbaugh, then trustees of Concord township, demised to said Burdett, the northwest quarter of section 16, range 4, township 12, for fifteen years, for certain specified improvements, as required by an act of the legislature, entitled an act directing the mode of leasing No. 16, and assigns breaches of the stipulations of the lease, whereby the said bond has become forfeit and an action has accrued. To this declaration the defendant has pleaded: 1. *Nil debet.* 2. That at the time of making said supposed lease, the trustees of *Concord township had no [185 power to lease any part of section 16 in Concord, because there was then more than twenty electors in the original surveyed

township within which said section 16 is situated. 3. That when said lease was made, the said Daniel, Feeson, and Harbaugh were not trustees of said township of Concord, nor empowered as such to make any lease of section 16. To these pleas the plaintiffs have demurred generally.

HAMILTON and MASON, for plaintiffs.

CRANE and JAMES, for defendants.

Judge WRIGHT, delivered the opinion of the court:

The counsel for the defendants admit that the first plea is bad. The admission might have been extended to embrace the second and third pleas also. They appear to me too loose and uncertain to be substantially good. The first admission sustains the demurrer as to the pleas, and does away the necessity of looking further into them. The defendants claim, however, that a bad plea is good enough for a bad declaration, and we are asked to examine the declaration, against which a number of objections are urged, such as the want of averment of entry; that the lease is without witnesses, and has not been recorded; that there is no privity between the plaintiffs and the lessee, and obligors; that it does not appear that the plaintiffs had any power to make a lease for school section 16.

We have in this state two kinds of township corporations. The inhabitants of the election district, properly organized (the political district), have trustees who are a body corporate, empowered to manage the local affairs of the people in such township. Within the land surveyed and sold by the United States, the inhabitants of each original surveyed township, in which is situate a school section, when they number twenty and upward, are authorized by law to elect officers, and thenceforth the trustees become a body corporate to manage the school section. The political township might include within its boundaries several entire original surveyed townships, or parts of several. The two corporations are distinct. The law in force, when the lease in question was exe-
186] cuted, empowered the trustees of the political *township, within which was situate any original surveyed township, containing a school section, where there were not twenty electors, to lease the school section, and secure the rents arising therefrom to

the inhabitants of said original surveyed township, when they should become incorporated. It is claimed by the plaintiffs that the case made in the declaration is one under this provision of this law, and that under it, the bond and lease in question can be sustained. The trustees of townships are a corporation for special limited purposes, with special and defined powers only, and can not, in general, do any act foreign to the purpose of their creation. 3 Ohio, 157; 8 Johns. 425; 9 Johns. 73; 12 Johns. 199; Kyd on Corp. 72. The power to lease the school sections is not within the general powers of the trustees of townships. That is a special authority which they are empowered to exercise in only one event. It would seem to follow, on common principles, that any one who would make title through these trustees, in the discharge of this special power, should be held to show, in his pleading, the existence of the state of things under which, alone, they could act. In this view, the declaration sets out no title, and the defect is one which can be noticed on the demurrer. We need not examine further, or remark upon the effect of naming the several sets of trustees, in the way they are named in this declaration, but will intimate that the safer way of pleading, in such cases, would be to omit the names of the persons exercising the duties of trustees, and use the corporate name only. We do not intend, in this decision, to intimate what our opinion would be in a case where it appeared that a lessee had entered and enjoyed the premises demised.

Leave to amend.

TRUSTEES OF GREEN TOWNSHIP *v.* JOHN ROBINSON.

THIS cause was adjourned from Highland county. It presented the same points as the foregoing case of Concord *v.* Miller et al. Leave was given to amend.

187] *DAVID PUTNAM, SUPERVISOR, ETC. v. JONATHAN VALENTINE AND OTHERS.

Chancery may restrain by injunction the doing of any act from which irreparable damage may be done to individuals, or great public injury ensue.

Surveyors of a public road can not have an injunction, to prevent obstructing a public road.

THIS was a billl in chancery brought here for decision from the county of Washington. The complainant, who describes himself a supervisor of highways, sets forth in his bill that a certain county road runs along the bank of the river Muskingum, between certain lots in the town of Marietta and the river, which lies within his district. That a bend in the river presents a point against which the water sets in a strong current that has washed away the soil between the top of the bank and low-water mark, leaving a quantity of stone as the only barrier against the waste of the bank and side of the road. That the defendants, acting under orders from the council of the town of Marietta, removed a boat load of stones from said point, and will, as he believes, commit further depredations of the like kind, to the great and irreparable waste and destruction of said bank, which will ultimately cause the bank and road to slide off, to the inconvenience of the public. He prays an injunction to stop this waste. To this bill there is a general demurrer, upon which the cause comes to a hearing.

GODDARD, for the complainant, cited 5 Ves. Jr. 129; 1 Swans.

NYE, for respondent, submitted four propositions:

1. That the complainant is a mere volunteer, having no interest in or title to the premises, and can not, therefore, sustain such a bill; for,

2. "In all these cases (of injunction for waste, etc.), the title of the plaintiff must be clearly shown by the bill, or the defendant may demur." Mit. Treat. 124; Davis v. Leo, 6 Ves. 787, 788; 1 Fonbl. Eq. 33, n. 1; 1 Johns. Ch. 318; 1 Bac. Abr. 286. An injunction is not granted where the plaintiff's right, or title, is

doubtful. Field v. Jackson, Dickens, 599; and see Storm v. Mann, 4 Johns. Ch.; 6 Ves. Jr. 51. Nor for a mere trespass. Dickens, 670; 2 Chit. Eq. Dig. 1346; 1 Johns. Ch. 318; Jerome v. Ross, 7 Johns. Ch. 333. Nor,

*3. Can the plaintiffs official character aid him, see 3 Rand. [188 63. "It is not the province of a court of equity to correct abuses merely public."

4. The injury complained of could not entitle the complainant to an injunction did he show title.

Judge WRIGHT delivered the opinion of the court:

The first question which arises in this case is: Has this court jurisdiction of the subject of the bill? Courts of equity exercise jurisdiction in cases of perpresture and nuisance; of encroachments upon the public rights, as upon highways, rivers, and streets of towns. This, though not of very frequent occurrence, is undoubtedly within the equity power of the court, and founded on the right to restrain the doing of any act, from which irreparable damage to individuals or great public injury would ensue. Eden on Inj. 157; 3 Atk. 751; Redes. Tr. 117.

Within the legitimate exercise of this jurisdiction, the following classes of cases will fall:

1. Those acts which injure the rights of the whole public, sovereign or state.

2. Those tending to injure the common rights of smaller communities, as the citizens of counties, cities, or towns.

3. Those affecting the rights of corporations, or evidencing the neglect by corporations to perform duties which are connected with the public convenience.

To the second of these classes the case in hearing is referable. To the first class we should refer threats of irreparable injury or destruction to public property or institutions. The case in 3 Rand. 63, relied upon by defendants' counsel, does not go to the length supposed. It sheds but little light upon the question. The complainant in that case sought to restrain the leveling of a street in Middleburg, Loudon county, because it would endanger the foundation of his house, etc. The judge says it is not the province of a court of equity to remedy abuses merely public, and dismissed the bill, because the complaint there was not of an injury of a private nature. Without deeming it necessary in this case

189] to go further, we *are of opinion that, in a proper case, this court can restrain from the commission of irreparable injury to public property.

The next question which presents itself to our consideration is, whether the supervisor of highways is authorized to commence and prosecute writs of this character? If we look to the legislative enactments on this subject, we find the supervisor intrusted with the duties of keeping open and in repair roads and highways within the district assigned to him, and empowered to appropriate materials from the adjoining lands, to direct the labor on the roads, and appropriate the taxes. To protect him in the performance of his duties, penalties are enacted against those who obstruct the roads, interrupt his acts, or refuse to obey him; and it is made his duty to sue in his own name to recover these penalties. The law defines with considerable particularity his duties, but it nowhere authorizes him to exercise a general control or supervision over the interest of his district or county, or control the general and public interest. It can not be successfully maintained that he derives power to conduct suits of this nature by express legislative provision, and we incline to the opinion that the effort to sustain the right from analogy will be equally fruitless. Suits to prevent the infraction of rights purely public are generally commenced and conducted in the name of the state or the officer intrusted with the conduct of public suits. Eden on Inj. 162; Ambl. 158; 3 Atk. 757; The King *v.* Governor, 2 Stark. N. P. C. 511; Attorney-General *v.* Philphot, Anst. 609; Same *v.* Richards, 2 Anst. 603; Same *v.* Richards, 2 Wils. Ch. 87; Same *v.* Utica Insurance Co., 2 Johns. Ch. 371. When the rights of smaller communities are infracted or threatened, cases have been prosecuted in the corporate name of the smaller community, as in The Mayor, etc., of London *v.* Balt, 5 Ves. 29; and Mayor, etc. *v.* Pamberton, 5 Swans. 244. It is not necessary to pursue this subject, or to determine now how such suits should be brought; it is sufficient to say that we are of opinion the supervisor of highways has no authority, as such, to commence and conduct prosecutions of this kind in his own name. The individual complainant has no such inter-

190] est in or connection with the *subject of this bill as to entitle him, as such, to the relief prayed for. It follows that the injunction asked can not be granted on this application. In coming to this conclusion, we do not deem it necessary to determine

whether, in any other form, the injury complained of or apprehended in this bill would support an injunction. And this opinion supersedes the necessity of discussing further the points raised in this case.

The demurrer is well taken. The injunction must be dissolved, and the bill dismissed at the costs of the complainant.

LESSEE OF PATTERSON *v.* PEASE, WALLACE, AND SHARPE.

A deed not attested by two witnesses, does not operate to pass the legal estate in land, and unless it does so operate, it can not contain a covenant of warranty, that works an estoppel against the maker, in asserting the legal title remaining in himself.

Conveyance made to the Shaker community, where wife is united to such community, in which provision is made for minor children, *quære*, is void under the statute?

Son, thirty years of age, living separate from the father, not protected by the statute.

THIS cause was adjourned here for decision from the county of Montgomery. It was an action of ejectment. The facts of the case, and the points made, are stated in the opinion of the court.

STODDARD, FALES, and MUNGER, for plaintiff.

B. COLLET and F. CORWIN, and LOWE, for defendants.

Opinion of the court, by Judge LANE:

The case presented for the decision of the court, as agreed by the parties, is this: In August, 1811, John Patterson, the plaintiff's father, being the owner of the premises in question, conveyed them to Valentine and Thruston by a deed in all respects well executed and authenticated, except that it was attested by but one witness. Before the execution of this deed the grantor's wife had united herself with the society of Shakers. At the time of the execution he had three minor children, to whom the consideration money, nine hundred and fifty dollars, was paid by the grantees,

as they successively became of age, in conformity with the terms of the sale.

191] *The apparent object of the deed was to make what the grantor esteemed a provision for his younger children, preparatory to uniting himself with the Shaker society. George Patterson, the lessor of the plaintiff, is the son of the grantor; he was, at the time of making the deed, about thirty years of age, and lived separate from his father, being himself the father of a family John Patterson is since deceased, and this suit is brought by his son, George Patterson, claiming his undivided portion of the land by descent, as one of his father's heirs at law.

Two objections are taken to the deed from John Patterson:

1. That it is rendered void by the statute providing for the support of women abandoned by their husbands.

2. That its execution is attested by but one witness.

We will examine the latter point first. Can a deed executed in 1811, attested by but one witness, pass the legal title to lands? It is conceded that such a deed is evidence of a contract, that, under proper circumstances, may be enforced in equity; but the legal estate must pass by it, to defeat, in this case, the plaintiff's recovery. The statute requires that the transfer of title to lands must be attended with certain forms, among which is the attestation of witnesses. No deed is complete without such attestation, nor can such deed, executed since 1808, pass the legal title by its direct operation.

But it is urged, that although the execution of the deed is imperfect, the covenant of warranty contained in it passes the legal title, upon the doctrine of rebutter.

A warranty is a covenant running with the land, which, by the ancient law, bound the grantor, and those to whom his estate descended, to give to the grantee land of equal value, in case of eviction from the land conveyed. If the grantor, or those to whom his warranty descended, should possess and exert the right to recover possession of the land from the granteee, the act of recovery created the right to recover, from the warrantor, land of equal value. To prevent this circuity of action, the law precluded the warrantor from recovering the land warranted from the warrantee. These doctrines continue to be law, although the warranty is enforced by action of covenant, sounding in damages

192] only; *and it is now held to be a settled principle, that a man

shall not recover in ejectment against a defendant, whose possession he is bound to maintain, by a valid covenant of warranty. 3 Ohio, 107; 4 Ohio, 411.

The difficulty that arises here is, to ascertain in what manner the covenant of warranty may be created. A warranty of this character does not arise from a mere personal engagement. It must be *a covenant real* annexed to the land, and running with it. It may be raised upon any description of conveyance, by which the title passes, or even upon a naked release, or deed of confirmation, that technically passes no title. Co. Lit. 311; 7 Bac. Ab. 227; Com. Dig., Gar. C. In the language of 10 Rep. 56, "every warranty ought to be knit and annexed to an estate, for every warranty hath its essence by dependency on an estate; and when the estate expires by its own limitation, the warranty depending on it is determined." We do not understand by this, that a warranty does not bind as a covenant, unless the estate actually passes by the deed. Our understanding is, that no warranty, to operate as a rebutter, can be created, except by a deed executed in the form in which the law permits an estate to pass. We have looked in vain for such a warranty, in any other form than in a deed executed with the legal formalities. The practice of enforcing the ancient warranties seems to show that the vassal could not recover of his lord, unless he could establish a tenure either by copyhold, or by deed duly authenticated. See 3 H. & B. Notes to Co. Lit., octavo ed., n. 315. Mr. Butler, note 328, deduces from Seymour's case, 10 Rep. 96, that no warranty is a bar, unless the estate be divested or displaced during the continuance of the warranty. This point seems to have passed under the adjudication of the court, in Dean *v.* Norwich, Brownlee, part 2, p. 165, where Coke, Justice, in deciding that a personal covenant, in a void lease, may be enforced by action, takes occasion to distinguish it from the warranty of a freehold, and asserts that "if a man make a feoffment with warranty of a freehold, *non feofavit* is a good plea; for if the feoffment be avoided, the warranty is likewise avoided, as that depends on the feoffment." These authorities satisfy us that this covenant does not possess the character of a warranty, *because [193 the instrument of writing that contains it is not one by which the title to the land is passed.

Neither does this instrument work such an estoppel as prevents the maker from asserting, in a court of law, his legal title.

Generally, no man is permitted to deny an admission made under his own seal. Where this duty can be enforced under the forms of pleading, it is called an estoppel. But the instrument itself, or the fact that the owner has attempted to convey land by an imperfect instrument, has never been held to bar him from setting up his title, unless it contains an effective clause of warranty. Co. Lit. 365, a; 14 Johns. 193. A simple personal covenant does not preclude him. To give it such effect, would subvert the well-established principle, that an equitable title can neither support nor defeat a recovery in ejectment. It would, moreover, enable every one to dispense with the salutary forms which the law requires to attend the solemnity of passing title to real estate, and thus defeat the object of the statute, which, from the commencement of titles in the territory, have from time to time been in force on this subject. It is an argument of irresistible force, that in the whole range of authorities within our reach not one has been found to maintain that the legal title is transmitted by such a deed. The case of Sullivant's Heirs *v.* Commissioners of Franklin County, 3 Ohio, 98, differs widely from this, inasmuch as that deed contained a direct permission to enter.

It is not necessary to go further to decide this case; but if we were required to determine whether the deed was void, upon the other ground taken, we should find it difficult to persuade ourselves, that the act of a man, whose wife was already a member of the Shaker community, and who sells land for the apparent and actual purpose of providing advancements to his minor children, was within the spirit, intention, or mischief of the statute. It would be equally difficult to persuade us, that a son, whose age exceeded thirty at the time of the sale, who was pursuing his own means of livelihood separate from his father, has any rights which fairly fall within the protection of a statute made to enforce the duties of a husband and parent toward those who 194] depend *upon him for support. Whatever might be our opinion upon this branch of the case, we are satisfied that the defendants can not protect themselves at law against the plaintiff's recovery in this action.

Judgment for plaintiff.

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RICHARD DOUGLASS v. THOMAS SCOTT.

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Complainant in possession of, and having the latter legal title, may ask the aid of equity, under the Ohio statute, to quiet that title against those pretending to claim.

Where A., having no grant, conveys to B. by a defective deed and puts him in possesion, and B. conveys to C., by a deed duly executed, with covenant of warranty, and puts him in possession, and A. subsequently obtains a grant, the title inures to C. by way of estoppel.

THIS cause came here for decision from the county of Ross. It was a bill in chancery asserting that the complainant held the legal title to certain lands, and was in possession, and that the respondents pretended a claim to the same lands. The prayer was that the complainant might be quieted against the claim of the defendant. The facts material to the decision of the cause are set out in the opinion of the court.

DOUGLAS and G. SWAN, for complainant.

SCOTT and LEONARD, for respondents.

Judge LANE deli vered the opinion of the court:

Nathaniel Massie was the proprietor of survey No. 2,462, entered January 9, 1795.

In the same year, he contracted to sell one hundred and eighty-eight acres of this land to H. Montgomery, who entered, claiming this title and died in possession, 1802; these are the tenements in dispute.

November 18, 1805, Massie, by a deed containing a covenant of general warranty, but executed in the presence of one witness only, conveyed these lands to the heirs of Montgomery. This deed, after giving boundaries, describes the land as "part of a survey patented to N. Massie."

November 16, 1811, the heirs of Montgomery, and grantees of the above deed, conveyed the same lands to Joseph Kerr. *This deed is well executed, in the presence of two witnesses, [195 with warranty; and contains the recital, "that it was part of sur-

vey No. ——, patented to Nathaniel Massie, and by him conveyed to them," the heirs of Montgomery.

Under this deed, Kerr took possession. August 30, 1813, Hughey recovered judgment against him for six hundred and one dollars. December 21, 1815, Byxbe recovered judgment for two hundred and twenty dollars.

In December 30, 1814, in the interval between the rendition of the two judgments, the land was patented to the heirs of Massie, he being dead.

Sundry executions were taken out upon the judgments, which were at no time dormant. In 1821, the land was sold, purchased by Douglass, sale confirmed, and deed made. If Kerr had a legal title to the land at the time of the judgment, that title passed.

On January 29, 1816, Kerr remaining in possession, mortgaged to the Bank of Chillicothe one hundred and fifty acres, by a deed, containing the same recitals, viz: that the land was patented to Massie, conveyed to him by the heirs of Montgomery, and by them conveyed to Kerr.

In June, 1822, *sci. fa.* was issued on the mortgage, judgment was had in 1823, by which, on the 18th of April, the land was sold and purchased by Scott; the sale was confirmed and deed made; Kerr released to Scott.

In August, 1823, Cadwalader Wallace, trustee of the heirs of Massie, created by the act of the legislature, conveyed the title remaining in Massie's heirs to Scott.

In 1827, Montgomery's heirs brought their bill in chancery, in common pleas of Ross county, and by a decree of that court, the deficiency in the deed from Massie to them was supplied.

Actions of ejectment have been prosecuted by Douglass, possession of the land been recovered, and still remains in him. He now brings this bill against all persons claiming under Kerr, to quiet his title, and to enjoin them from ever disturbing it.

It is first to be inquired whether he has the remedy in chancery. We do not feel it necessary to inquire under what circumstances a bill of peace, properly so called, is sustainable, or whether the 196] English chancellor, in a case like *the present, would find the plaintiff's right satisfactorily established, and restrain further litigation as vexatious; we believe our own statute extends the English remedy, by bill *quia timet*, and in providing that he who

is in possession of land, and having the legal title, may call any pretending a claim to come forward and assert it, has rendered plain the right of the plaintiff to pursue the present remedy.

The right to file this bill depends upon the existence of a legal title, at the time the bill is brought; the whole case which the plaintiff can make, is embraced in the proposition that he had a legal title, superior to any in the claim of the defendants.

The transaction has become of a pretty complicated character, and a great variety of points have been submitted to our consideration. Among others, there have been argued the following questions:

1. Whether Massie's heirs take by descent or purchase, under the patent to them, issuing on a survey by their ancestor.

2. Whether the want of a witness in the deed from Massie to Montgomery's heirs is cured by the statute of 1826, it having been executed prior to 1808.

3. Whether the statute of uses was in force in Ohio, and if it would raise a use and pass a legal estate in a deed attested by a single witness.

4. Whether a warranty in a deed from Montgomery's heirs to Kerr estops all persons claiming through that deed.

5. Whether the statute of limitation acts on lands held by survey before patent, so that the adverse possessor acquires title against all except the government.

6. Whether a descent cast, takes away the action of ejectment in Ohio.

These questions have been argued with much learning and an unsparing industry; but we have been relieved from the necessity of adjudicating them, from finding the legal title established in Douglass, without tracing it through them; my object in this enumeration is to show that we have not disregarded the bearing they have upon the case.

To sustain an action of ejectment, it is generally necessary for the plaintiff to show a perfect legal title in himself; *a proof [197 of title in another will usually furnish a sufficient defense. Yet there are exceptions to this rule, and the well-known cases of those holding interests in lands inferior to the other, as vendees, tenants, mortgagees, are examples of persons who stand in that relation to the persons having the superior interest, that they are not permitted to contest their title, when seeking to enforce their

lawful rights. The reason is, that the title of the tenant is derivative only, and if he from whom it comes has no right, the title of the tenant suits with it. The same principle has been extended to cases where the title of both parties springs from the same source; it seems well established in New York and Pennsylvania, that where the title of both parties is disclosed, and found to have a common origin, it is not permitted to either party to go behind the person from whom they hold, or show that his claim is not good. 10 Johns. 292; 17 Id. 165; Serg. & Rawl. 339.

A majority of the judges who sit in this case would be willing to hold, if necessary, that as Kerr is shown to be the common source of title to both parties, it is not competent to either to deny the right of him from whom alone his own claim arises.

But we unite in the opinion that the facts offer more satisfactory proof of a legal title by giving effect to another principle.

The admission of a fact, however made, is always evidence of the fact against the party making the admission, but the effect of the admission depends upon the manner and purpose for which it is made. It may be presumptive evidence only of the truth, and liable to be denied or disproved. But if made for the purpose of influencing the conduct, or of deriving a benefit to another, so that it can not be denied without a breach of good faith, the law enforces the rule of good words as a rule of policy, and precludes the party from repudiating his representations and denying the truth of his admissions; and an admission of record, or made for the purpose of superseding proof, or deliberately made under the seal of the party, is of such binding efficacy that under no circumstances is the party permitted to disprove it. Such an admission, under the seal of the party, not only prevents
198] *him from disputing, not the truth of the deed itself, but the truth of any fact which it states; for a deed is a solemn act, to any part of which the law gives effect, as the deliberate admission of the maker; it stands to him for truth, and in every situation that he may be placed in, to him it is true.

The obligation created by estoppel not only binds the party making it, but all persons privy to him; the legal representatives of the party, those who stand in his situation by act of law, and all who take his estate by contract, stand in his stead, and are subjected to all the consequences which accrue to him. It adheres to the land, is transmitted with the estate; it becomes a

muniment of title, and all who afterward acquire the title take it subject to the burden which the existence of the fact imposes on it.

These principles had their origin at a very early period in the common law, and have been adopted in the most respectable courts in our own country.

If the condition of a bond recites there are divers suits, the obligor is estopped to say there are no suits. Cro. Eliz. 756.

If a condition be to perform the covenants of an indenture, he is estopped to say there is no indenture. 1 Roll. 872.

If a condition be that he and his wife shall do an act, he is estopped to say he has no wife. 1 Roll. 873.

The above are only examples to which a long list may be added. The case which is most usually presented is the recital of a lease or deed; that such recital is evidence of the existence of the lease has been repeatedly adjudged. 1 Salk. 295; 1 P. Wms. 432; Willes, 9.

The law seems to be summed up in Com. Dig., Estoppel, 77, A. 2: "In all cases where the condition of a deed has reference to any particular thing, the obligor shall be estopped to say there is no such thing."

That the estoppel extends to all persons subsequently acquiring title has at all times been the doctrine of the books. In Trevinan v. Lawrence, the court say: "Where the estoppel works on the interest in the land, it runs with the land into whose hands it may come;" and Justice Story, in the *case in 4 Peters, 85, re- [199 viewing the authorities, says: "Such estoppel binds all persons claiming the land, not only in the same deed, but under any subsequent conveyance from the same party, that such an admission in a recital, by the same person transmitting the title, is a muniment of title, and travels with the land into whomsoever's hands it may come."

The application of these principles seems to us to invest the plaintiff with a legal title. His title depends upon the fact whether Kerr had a legal title to which the judgment lien could attach.

He was in possession, claiming title derived through Montgomery from Massie. Although the deed from Massie to Montgomery contains the recital that the land was patented to Massie, it is doubtful whether the incidents and consequences of a perfect deed attach to it, in consequence of the imperfections in its attestation. We have decided, the present term, that the estoppel is not raised

on a covenant of warranty contained in such a deed. Patterson *v.* Sharpe and others, *ante.*

The deed from Montgomery's heirs to Kerr is the one on which the plaintiff may insist, as investing Kerr with the title necessary to support a levy at law. It contains the recital that the land was patented to Massie, and conveyed by him to the heirs of Montgomery. It was an admission, in a deed altogether well executed, by persons having the lawful possession and at least the equitable title. Kerr, taking the right of the Montgomerys, has a right to hold them bound by this admission. And Kerr himself is bound, and will not rely upon the deed from Kerr to the bank, containing the same admission; but estoppels are mutual, binding on both parties, and the acceptance of the title by this deed makes him a party to the admission; and the assignee, he to whom the estate comes, either by the act of law or the act of the party, are alike concluded. That the land was patented to Massie, and by him conveyed to the heirs of Montgomery, are facts proved by the admissions of the heirs of Montgomery, while the owners of the property, upon which all persons deriving the title under them have a right to rely, and which conclude all persons to whom their estate is transmitted. If these facts exist, Kerr's legal title in fee
200] *was perfect; that they are true, neither of the parties, as deriving title through this deed, is at liberty to question.

Of Wallace's deed to Scott, it is only necessary to say he was made by an act of the legislature a special trustee, with power to convey the legal title to those who have the right to it. If he convey to another than the lawful holder his acts are void. The opinion we have before expressed leads us to the conclusion that at that time Douglass had, as between these parties, the title perfect at law, and such an act of Wallace can confer no interest.

TREASURER OF FRANKLIN COUNTY *v.* JOHN MCELVAIN AND OTHERS.

Where a removed administrator has settled with the court, and the balance in his hands is ascertained, suit may be sustained against his sureties, without obtaining a separate judgment against him. In such suit, there is no necessity to aver, that the removed administrator had notice of his successor's appointment.

Treasurer of Franklin Co. v. McElvain et al.

THIS was an action of debt upon an administrator's bond, and was adjourned here for decision from the county of Franklin, on a demurrer to the declaration.

The declaration set forth a bond, wherein it was recited that Robert W. Riley had been appointed administrator of James Downs, deceased, and that on December 8, 1824, the other defendants, with Robert W. Riley, made the bond in due form of law. It then averred that Riley, as administrator, settled his accounts with the court in September, 1828, when a balance was found in his hands of one hundred and eighty dollars; that debts were due from the estate of Downs which Riley had neglected to pay, whereupon the court removed him from the office of administrator, and appointed George Raridon, for whose use this suit was prosecuted. It further avers that Riley refused to pay the balance to Raridon, etc.

The defendants demurred generally.

G. R. SWAN, for plaintiff.

PARISH and BOAL, for defendants.

*By the COURT: [201

In support of their demurrer to the declaration, the defendants take two exceptions:

First. That there is no averment that Raridon, the administrator, *de bonis non*, had obtained a judgment against Riley, the removed admistrator, for the money alleged to remain in his hands.

Second. That there is no averment of the notice to Riley of the appoinment of Raridon to supersede him.

The averment of a settlement, by the court, with Riley, before his removal, and that the sum claimed was, by that settlement, ascertained to be in his hands, is sufficient to sustain the action. The court so decided, when the action was for the use of the heir. Treasurer of Pickaway Co. *v.* Hall, 2 Ohio, 225. If there had been no settlement by Riley, with the court, an action by Raridon against Riley would have been necessary. To compel the removed administrator to give special bail to his successor, and so far secure a recovery for the injury done to the assets in his hands, by carelessness or otherwise, was, most probably, the reason for enacting section 14 of the act defining the duties of executors and administrators. 22 Ohio L. 128. Without this provision, the adminis-

trator *de bonis non* could have sustained an action against the removed administrator.

There is no force in the second objection. The removal of one administrator, and the appointment of another to succeed him, is a judicial proceeding of such notoriety that all parties connected with the transaction are bound to take notice of it. The averment supposed necessary is not found in any precedents of declaration, by the administrator *de bonis non*, against the removed administrator. Upon principle, we see no necessity for it.

The defendants having asked leave to withdraw the demurrer, and plead, in case the opinion of the court was against them, that leave was accordingly given.

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202] *JAMES ROLAND v. CHRISTIAN GUNDY.

The owner of a chattel, sold by the bailee, can recover the specific chattel or its value of whomsoever he may find in possession of it.

THIS cause came before the court, upon a writ of error to the common pleas of the county of Morgan, and was adjourned here for decision by the Supreme Court in that county.

The original suit was an action of replevin, brought by Gundy against Roland for a horse. Verdict and judgment for the plaintiff. Upon the trial, it appeared that Gundy had lent the horse in question to one McConnel, who sold the horse to Isaac Roland, who sold him to the defendant, neither of whom had any notice of Gundy's claim. The counsel for the defendant, on this testimony moved the court to instruct the jury that the plaintiff could not recover. The instruction was refused, and this refusal was assigned for error.

HANNA, for the plaintiff in error, contended that the case of a bailee was distinguishable from that of a felony; that where the owner of a chattel confided it to the possession of another, he confided with it a power to dispose of it to any person who might purchase, without notice that the seller was but a bailee. He cited 1 Cranch, 309; Bro. Tit. Tres. 216. 295; 2 Saund, 47, in note; 5 Term, 175.

GODDARD, contra, cited Croke Jas. 244; 2 Ves. Jr. 376; 2 Caine, 202; 1 Johns. 478; 5 Johns. 258; 8 Johns. 96; 12 Johns. 146; 8 Mass. 518, 14 Mass. 499.

Judge HITCHCOCK delivered the opinion of the court:

The decision of this case depends upon the solution of the question, whether the bailee of personal property can, by sale to an innocent purchaser, transfer an absolute right, so that the vendee can hold the same as against the bailor. When the cause was first submitted to the court, we were under the impression that there could be no doubt upon the subject. It is not, however, without its difficulties. The *early cases seem to have gone upon [203 the principle that such sale changes the property. In a note to 2 Saunders, 47, it is said, in speaking of the action of trespass, that if the bailee, or other person, who has only special property, sells and delivers the goods to another, as his own *bona fide*, and without notice, the general owner can not maintain this, or any other action against the vendee, because by such sale by a person who has the special property in, and possession in fact of the goods, the property of the general owner is changed. For this dictum, the annotator cites Brooke's Tres. 216, 295. Such seems in ancient times to have been the law, and it was founded upon this principle: That if one of two innocent persons must suffer, the one who has been the occasion of the loss should sustain it, however innocent. If the bailor puts confidence in the bailee, and intrusts him with property, and the bailee abuses that confidence, and sells the property, the purchaser having no notice of the facts, it would seem to be but reasonable that he who has been the first cause of the fraud should suffer the consequences. Althongh such was the law in cases of sale by a bailee, it was otherwise where the vendor obtained possession feloniously. In such case, the purchaser acquired no title, unless the sale was in market overt. In more modern times, however, this distinction seems to have been done away, and it is now holden that the bailee, no more than the felon, can confer a title unless the sale be in market overt. The principle, that if one of two innocent persons must suffer, the one who occasions the loss shall sustain it, is superseded, and the rule introduced that he who has not been the occasion of the loss shall alone sustain it, notwithstanding his innocence. And this is said to have been done from motives of public policy. I do not readily

comprehend how it ever can be consistent with public policy, to adopt any principle which operates unjustly. Such, I take it, however, is now the law in England, and in that country there may be some color ot reason for it, inasmuch as there they have markets overt. In this country, however, markets overt, as they exist in England, are unknown. Kent Com. 262. But the same principle prevails as to the rights acquired by the vendee. And the maxim of the law in this as well as in 204] that country is, that no *one can transfer a greater right or better title than he himself possesses. Kent Com. 262; 5 Serg. & Rawle, 130. It is not for us to inquire as to the equity of the maxim, as applicable to particular cases. There may be exceptions to the general rule, but the case before the court is not of that character. The judgment of the common pleas must be affirmed.

THE WIDOW AND HEIRS AT LAW OF WM. REYNOLDS, DECEASED, v. THE COMMISSIONERS OF STARK COUNTY.

Where real estate is vested absolutely in the county commissioners, for public purposes, they may dispose of it in the same manner as individuals could.

THIS was a suit in chancery, certified from Stark county. The bill sought to enforce the specific performance of a contract, made between the commissioners of Stark county and Wm. Reynolds, in his lifetime, reduced to writing, and dated May 28, 1823, for a lease of a certain part of the grounds originally appropriated, by the proprietors of the town of Canton, for a site for public buildings. Previous to the making of the contract, these proprietors had released all their interest to these grounds to the commissioners. The bill set forth the written contract, and charged a part performance, by payment of one year's rent, and entering into possession, and erecting buildings with the knowledge of the then commissioners, and without objection from them.

The present commissioners refused to perfect the contract, by making the lease, and deny their own power to do so, or that of their predecessors to make it.

The court of common pleas dismissed the bill, and the complainants appealed.

HARRIS, for complainants.

LOOMIS, for defendants.

*Judge LANE delivered the opinion of the court: [205

This is a bill in chancery, brought to enforce the specific performance of a contract to make a lease.

In 1819, B. Wells, for certain considerations, received from the treasurer of Stark county, conveyed by a deed, with general warranty, lot No. 30, in Canton, to the then commissioners, to hold for the use of the county, thereon to erect a court-house, offices, etc., and for no other purpose. That deed contained a proviso that it should be void if the lot should be appropriated to any other purpose. On May 23, 1823, Wells released to the commissioners all his right in reversion in that lot.

On June 28, 1823, the then commissioners agreed to lease to Reynolds, the ancestor of the plaintiffs, thirty feet front, from the west part, for ninety-nine years, renewable forever, at the rent of eighteen dollars per annum, but not to be subjected to any occupation likely to interfere with the due enjoyment of the residue. The agreement also contains a stipulation, that if Reynolds should pay three hundred dollars the lease should be given at a rent merely nominal. Rent has been paid for one year, but the present commissioners refuse to give the lease. During the pendency of the suit Reynolds has died, and the suit is revived in the name of the widow and heirs.

The present commissioners deny the power of the board of 1823, either to make a contract binding upon their successors or to make a valid lease of the corporation land; state the agreement to be, in substance, a contract to convey in fee; that if they had no power to sell in fee they do not possess the power to lease for ninety-nine years, renewable forever.

A corporation is an artificial person, and by the terms of its creation it possesses the same capacity, to purchase or to sell, that an individual has who possesses the capacity to contract. This doctrine has been long settled, and repeatedly recognized, from a very early period to the present time. Co. Lit. 44, 300, 306; Sid. 162; Com. Dig., title Franchise; 1 Ves. & Beame, 226. Indeed, so necessarily incidental *is this power, that it has been [206 holden (10 Rep. 1), that a corporation can not be created possessing

the power of holding without the power of disposing; and that a clause in the charter, restricting the alienation of their property without consent of the chancellor, is void. The statutes restraining ecclesiastical and eleemosynary corporations are all the limitations imposed by the laws of England upon the power to sell.

Admitting that civil corporations incidentally possess the power to transfer a good title by deed, it may still be insisted that a person taking the estate holds it subject to the same trusts as while in the hands of the corporation. Perhaps such a trust may sometimes be raised by the terms of the donation. If the land be made subject to uses expressed on the face of the deed, which can not be enjoyed consistently with the exclusive dominion and enjoyment of the alienee, perhaps the trust might be enforced: as where lands were given to a municipal corporation, to be holden for a common, walk, or public fountain, perhaps the purchaser may take it, subject to the rights of the inhabitants. But the case before cited, from Vesey & Beame, shows that when property held for general corporate purposes is alioned, even for purposes not corporate, such alienation is absolute.

In the present case, the lot was first conveyed by Wells to the commissioners, with a condition to be void in case the lot was appropriated to any other purpose than to erect the court-house and public offices. In 1823, Wells released his reversionary interest to the commissioners, by which, in our opinion, it became their absolute property for general purposes, and subject to alienation by them.

It may be said, that by this construction of their powers the officers of corporations are invested with too large an authority over corporation property, and may waste it or place it beyond the reach of the members, without remedy. We can not avoid this result. We can relieve in case of fraud, and where a specific trust is raised we can enforce it; but the security against improvidence or bad management must be looked for in the interests, wisdom, and justice of the official agents, and in the relations they sustained to those who conferred the authority.

207] *Believing that the commissioners possess the powers of individuals, we enforce contracts against them in the same manner. The execution of this agreement is not an official duty created by law, and therefore properly the subject of a mandamus;

but the right springs from contract, to enforce which an appeal may be properly made to our general chancery powers.

But the bill seeks to enforce the specific performance to make a lease. A lease is personal property, although the present contains a stipulation that it shall be renewable forever, yet any estate, short of freehold, gives the heir no interest. The heirs and widow are only parties. The right to be enforced is technically in the administrators; they must be parties complainants before we can finally settle the cause.

Contra, 10 Peters, 257.

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BANK OF STEUBENVILLE *v.* H. H. LEAVITT AND JUDITH CARROL, ADMINISTRATORS OF ROBERT CARROL, DECEASED.

Where a creditor suspended his right to proceed promptly against a principal debtor to enforce the collection of his debt, the surety is discharged. The defense may be made at law, as well as in equity. The plea should aver that the suspension was without the assent of the surety.

THIS cause was adjourned from the county of Jefferson. It was an action of debt, brought in the common pleas of Jefferson county, to November term, 1830. The declaration counted upon a writing obligatory made by the intestate in his lifetime, dated August 7, 1819, for the payment of one thousand four hundred and thirty dollars to the Bank of Steubenville, at that bank, sixty days after date.

At the May term of the same common pleas, 1831, the defendants pleaded in substance that their intestate executed the writing obligatory declared upon as security for one John C. Bayless, and not as principal debtor, and that it was so known to the plaintiffs, who then accepted and received said writing obligatory from their intestate as surety only. That since the commencement of the suit, John C. Bayless, the principal debtor, had made a power of attorney, authorizing W. W. Tracy, or any other attorney, to appear in any of the courts of record of Ohio, and confess judgment *to the plaintiffs for certain specified sums of money, [208 with stay of execution for one-third of the amount for six months, one-third for twelve, and one-third for eighteen months. That after the last continuance of the cause, at May term, 1831, under

and by virtue of this power of attorney, the plaintiffs caused a judgment to be confessed for the sum of one thousand four hundred and thirty dollars debt, and seven hundred and ninety-two dollars and twenty cents interest and costs, with stay of execution as set forth in the warrant of attorney. And the defendants aver that the obligation upon which the judgment is confessed, is the same upon which the plaintiffs count in this case.

To this plea there is a general demurrer and joinder. The common pleas gave judgment for the defendants, and the cause was taken by appeal to the Supreme Court.

MARSH and STOKELY, in support of the demurrer:

To show as distinctly as possible the precise questions arising on this record, we will make a brief synopsis of the pleadings. The plaintiffs declare on a bond of Robert Carrol, dated August 27, 1819, payable in sixty days at the bank, for one thousand four hundred and thirty dollars, with a profert, and aver non-payment, etc. Suit is brought to November term, 1830.

The defendants plead *puis darien continuance* without oyer, in bar of the further maintenance of the suit, and that the bond, in the declaration mentioned, was made by Carrol as surety for one John C. Bayless and not as principal, and was so accepted by plaintiffs.

That since the commencement of this suit, viz: December 20, 1830, Bayless executed and delivered a sealed power of attorney, authorizing judgment to be entered against him, *inter alia*, on a note for one thousand four hundred and thirty dollars, signed by him and Robert Carrol, with stay of execution for six, twelve, and eighteen months.

That plaintiffs, since the last continuance, viz: at May term, 1831, by virtue of said power of attorney, entered judgment in said court, against said Bayless, on said writing obligatory, in said declaration mentioned, with a stay of execution as the warrant specified.

209] *Defendants aver that the note for one thousand four hundred and thirty dollars, in the warrant of attorney mentioned, and the bond in the declaration mentioned, are the same, etc.

General demurrer and joinder.

On this demurrer three questions arise:

1. It is not averred in the plea that the judgment against Bayless was entered without the knowledge and consent of the defendants.

It is a rule in pleading that every plea is to be taken most strongly against the party pleading. Wimbish v. Talbois, Plowd. 46; Co. Lit. 303, b; 1 Chit. Pl. 522. Here it is to be inferred that the judgment was taken with the assent of the defendants and then they have no ground for complaint. The substance of the objection to a recovery from the surety after giving time to the principal is, that the creditor has changed the contract without the assent of the surety, whereby the surety is injured. If, then, the arrangement be made with the assent of the surety, the ground of the objection does not exist.

2. It is not averred in the plea that the principal has become in worse circumstances, or that the surety is in any way injured by the arrangement.

This plea is an attempt to make an equitable ground for an injunction, in particular cases, a defense, on a general principle at law. It will be found that the plea places it on grounds which have never been assumed as warranting a decree in equity. No bill can be found placing a prayer for relief on the naked fact that time had been given. Essential and indispensable parts of every bill for relief have been that the arrangement had been made without the assent of the surety, and that since the arrangement the affairs of the principal have so altered as to place the surety in a worse situation, as to indemnity from the principal, by the delay. Rees v. Berrington, 2 Ves. Jr. 250; Samuel v. Howarth, 3 Merivale, 271; 2 Rand. 333.

3. Where time is given to the principal after the bond is due, the surety can not avail himself of it at law, but must seek relief in equity, if his case entitle him to it.

*The ground of defense is the alteration of the contract [210 without the assent of the surety. Where the time of payment is extended before the day of payment, it is considered as a waiver of the performance, a change of the terms of the contract, but after the forfeiture of the bond, any arrangements do not affect the bond, but concern only the compensation for the breach of it. Davey v. Hendergrass, 5 Barn. & Ald. 187; United States v. Howell, 4 Wash. C. C. 620. In this last case the point is distinctly made and decided. The same distinction is recognized in Rees v. Berrington, 2 Ves. Jr. 520. The same distinction is also recog-

nized in Orme v. Young, 1 Holt's N. P. Cases, 84, both in the pleadings and by the court in giving judgment.

In this case the stay is long after the forfeiture of the bond, after judgment, and not without the assent of the surety, so that, on the facts disclosed in this plea, neither at law nor in equity is there any ground for discharging the defendants from the payment of the bond.

J. and D. L. COLLIER, and GOODENOW and WRIGHT, for defendants:

The plaintiffs, in support of their demurrer, rely upon three points:

1. That it is not averred in the plea that the judgment against Bayless was entered without the knowledge and consent of the defendants.

2. That it is not averred, that the principal has become in worse circumstances, or that the surety is in any way injured by the arrangement.

3. Where time is given to the principal, after the bond is due, the surety can not avail himself of it at law, but must seek relief in equity, if his case entitle him to it.

We prefer, in answering the arguments of the demurrants, to examine the points raised, in the reverse order in which the plaintiffs have treated them, and will, therefore, speak first to the third point, that our relief, if anywhere, is in equity.

Before, however, we proceed directly to that point, we would 211] remark, that the plea alleges the decedent signed and *sealed as a surety, and not as a principal, which is admitted by the demurrer; and therefore the inquiry is presented free of all embarrassment. Is the security discharged by the creditors giving the principal further credit, or time of payment, and taking other and higher security? If so, can he avail himself of these suits at law?

That such further credit, or extension of the time of payment, may be pleaded at law, we think is sustained by the whole current of authorities, both in England and in this country; a reference to a few of which we consider sufficient to advise the court fully of the established principles and doctrines on the subject. 13 Johns. 174; 17 Johns. 384; 3 Merv. 276; 1 Vern. 196; 2 Caine, 56; 2 Rand. 334; 3 Wash. C. C. 74.

We think, from these authorities, there can be no doubt the

rule is the same at law as in equity; and the only doubt which could, perhaps, ever arise would be, whether the mode of proof and relief at law were such as to give effect to the principle. As to this question, it may be observed that every case furnishes for itself the circumstances which decide the applicability of the principle; and we see nothing here to prevent the defendants from availing themselves of the full benefit of the rule on this side of the court as well as on the chancery bench. Surely it is not in the mouth of the plaintiffs to complain, and call him over to the other side of the court, to receive there the application of that rule, which applied here, will mete out to him the same justice and equity.

The second point raised by the demurrants is, that we do not show by our plea that the principal has, by the judgment against him and extension of time, "become in worse circumstances, or that the surety has been injured" thereby. Here we would refer to a remark of the plaintiff's counsel, under his first head, which we think more congruous with the one now under consideration, namely, that "the substance of the objection to a recovery from the surety, after giving time to the principal, is that the creditor has changed the contract without the assent of the surety, whereby the surety is injured."

It seems to us the counsel on the other side have *misap- [212 prehended the principle upon which the plea is predicated. The doctrine in reference to a "change of contract," speaking in technical language, is this: that the alteration or change must be made while the contract is yet open and its time of performance unexpended; at least this doctrine embraces a class of cases different from ours, and in this point of view forms no feature of our defense. We rely upon the principles of law, applicable to cases where a higher security has been taken on the same instrument, and a further credit given, after a right of action has accrued.

We rely upon the positions: That a security is bound by the express terms of his contract, and by them alone; that they can neither be narrowed, extended, or modified at the will and pleasure of the principal and creditor; that the giving of further credit or further time to the principal, whereby he suspends his own right to demand or to enforce his claim, is an act which the creditor does at his peril, and has no right to hold the surety still subject to an action or judgment at law; because by his own act he

robs the surety of a right which entered into and formed a part of his original undertaking. These positions are as well established in courts of law as in courts of equity; are as broadly and liberally applied in the one as in the other; are certain, and rest upon fixed principles, and admit of the proof of facts and the efficacy of relief at law as well as in equity. It is in cases where the creditor has given indulgence contrary to the will and directions of the surety, where courts of equity would coerce the creditor to diligence, that the inquiry ever arises whether the principal has become less able to pay or the surety has, in fact, been injured. It would, indeed, be a doctrine not only novel but full of perplexity and endless inquiry, to establish the principle that the extension of credit or time to the principal should or should not be a discharge of the surety, depending upon the future good or bad fortune, the industrious or idle life, or the wise or foolish speculations of the principal during such extension. Hence we think reason and common sense, as well as the authorities, establish unequivocally, at law as well as in equity, that the taking of a judgment against the principal and extending to him a definite time of pay-
213] ment, which prevents the *security, either by a court of equity or otherwise, from coercing the creditor to prosecute, and himself from taking any steps of indemnification, aside from the inquiry, whether he is or is not damnified, is, in itself, a discharge or release of the surety. We refer the court to the following authorities, which present the doctrines and principles of law on this point in every different aspect, and, as we humbly conceive, most clearly and satisfactorily sustain the plea: 9 Wheat. 680; 2 Bro. C. C. 583; 15 East, 617; 4 Taunt. 453; 5 East, 619; 5 Taunt. 319; 10 Johns. 587; 1 Saund. Pl. & Ev. 377; 2 Ves. 440; 4 Ves. 737; 12 Wheat. 554; 1 Mason, 323; 1 Paine, 305; 3 Wash. C. C. 70; Kirby, 397; 1 Caine, 1; 3 Bin. 523; 6 Bin. 295; 2 Johns. Ch. 559; 2 Des. 230, 389; 3 Des. 604; 4 Johns. Ch. 131; 2 Randolph, 333; 6 Mon. 9; 1 Mon. 45; 13 Johns. 174.

Upon the first point made by the demurrers, that "it is not averred in the plea that the judgment against Bayless was entered without the knowledge and consent of the defendants," we deem it proper to say that it was not raised in any argument heretofore made in the cause. Whether the averment be necessary, we have not examined or reflected sufficiently upon it to argue it. But we would suggest that the facts set forth in the plea afford no

inference that the defendants had knowledge of, or consented to the "arrangement." Why, then, should they be required to negative that which is not inferable from the facts stated? Although "every plea is to be taken most strongly against the party pleading;" yet unless, as on a demurrer to evidence, the facts fairly authorize the inference, it is not to be drawn or taken against the pleader; no more than on the same facts before a jury they would be authorized or required to infer the knowledge or consent of the party. The entry of judgment is a fact over which the defendants had not, nor could they have any control; nor is their privity inferable from their relation to the parties to that judgment. Hence it seems to us that if their knowledge and consent would destroy the bar which the plea sets forth, it were the duty of the plaintiffs to reply to that fact.

But being now first advised of this exception to the plea, and not having been ourselves originally employed in this *cause, [214 should the court sustain the plea on the other material points we would ask permission of the court to amend in that particular, that the decision on the merits may be known, if possible, at the present term, as there are other causes depending much upon the same facts and principles.

By the COURT:

He who becomes surety for another has a right to pay the debt when it becomes due, and collect it from his principal; he may substitute himself in place of the creditor, and subject any funds or securities provided for the payment of the debt by the principal; or he may call upon the creditor to prosecute his suit without delay. The law does not permit the creditor to interfere with these rights. If he do invade them, the surety is held to be discharged.

No principle is better settled, at the present day, than that a surety can not be further bound than by the terms of his undertaking. These terms can not be changed without his consent. If any change is made that might prejudice his rights, without his consent, he is protected by holding his obligation at an end. A simple omission on the part of the creditor to pursue this remedy is not considered as affecting the rights of either party. But any act which destroys or suspends the right to an instant and continuing pursuit of the remedy, so as that the surety can not

enforce the collection of the debt without delay, absolves him from his liability.

The defense which such an act gives to the surety is one proper to be set up in a court of law. The doctrine is originally of chancery, and is of recent introduction there. Its adoption, in the courts of law, is almost within our own times. 4 Cam. C. 336. And it prevails, in either court, according to the circumstances of the case. The authorities upon which it rests are very numerous. 7 Johns. 336; 12 Johns. 174; 17 Johns. 384; 2 Merivale, 276; 4 Johns. Ch. 7, 337; 2 Marsh. 82, 392; 2 Ves. Jr. 550; 4 Ves. 737; 1 Gall. 32. 1 Mass. 339; 1 Paine, 305; 3 Wash. C. C. 7; 4 Wash. C. C. 26; 2 Rand. 333; 12 Wheat. 556.

215] *In the case in 2 Rand., the court lay down the doctrine broadly: "If a creditor, by agreement with the principal debtor, or by any other act, precludes himself, at law, from proceeding against the principal, after the debt is due, for a moment, or if the agreement is such that a court of equity would stay proceedings at law, the surety is discharged." Here is a judgment with a stay of execution entered of record. This ties up the creditor's hands. If the surety were to pay the debt, he could do nothing with the judgment until the stay of execution expired. The consideration upon which the stay of execution was entered is not a matter for investigation. The fact that it is entered suspends the creditor's right to sue execution, until the entry is avoided. That is sufficient to discharge the surety.

It is objected to the plea that it does not sufficiently aver that the stay of execution was entered without the consent of the surety. The want of this consent is the material facts of the whole defense. We therefore think that the plea is defective. But leave is given to amend.

Judge WRIGHT, having been counsel, did not sit in this case.

MOSES ELDRED *v.* JAMES H. SEXTON.

Tax collector justifies as such, proof of acting and general reputation sufficient.

THIS cause came before the court upon a writ of error to the court of common pleas of Lorain county.

The defendant in error brought an action of trespass against the plaintiff in error for taking and converting a yoke of oxen; judgment for the defendant by the justice, and appeal. In the common pleas a declaration in trespass was filed, and Eldred, the defendant there, on the plea of the general issue, filed a notice, that at the trial he would prove that before the alleged trespass, he was treasurer of school district No. 3; that a majority of the directors of the school district called a meeting of the householders and others liable to pay a tax for building and repairing school-houses, at which meeting it was decided to raise money to repair the school-house, etc. Setting forth a regular assessment *of tax for that purpose, and that a certain amount of tax [216 was assessed upon Sexton, and put in Eldred's hands, as treasurer, to collect; that Sexton refused to make payment, and that the seizure and sale was made, according to law, to make the amount.

At the trial, Eldred under his notice offered to prove by parol that at the time of taking the property he acted as treasurer of the school district named, and was reputed to be treasurer and collector. To this testimony the plaintiff objected, and it was overruled by the court. The defendant took his bill of exceptions. There was a verdict and judgment for the plaintiff for fifty-one dollars and five cents and costs, to reverse which this writ of error was brought.

No argument was submitted, for the plaintiff.

WILLEY, for defendant.

By the COURT:

The question raised in the case seems to have been settled by this court, in the case of Johnson *v.* Steadman, 3 Ohio, 94. In that case it was decided that a person who has justified an act,

upon the ground that he was a constable, might establish his official character by general reputation, and proof that he acted as such. We are not disposed to change the principle established in that case. In fact, we are satisfied that it is more consistent with the end of justice, than to establish a contrary rule of evidence. We do not say that such evidence is conclusive; but that it is *prima facie*, and, unless contradicted, must be conclusive.

217] *STATE OF INDIANA, FOR THE USE OF CONE, v. ROBERT JOHN AND OTHERS.

Suit upon a bond subjecting the obligors to payment of statutory penalty for misfeasance in office, is an action on a penal statute, and can not be maintained, in Ohio, on a statute of Indiana.

THIS cause was adjourned from the county of Hamilton. It was an action of debt, and set out that the defendants, on March 7, 1825, made their writing obligatory, by which they acknowledged themselves to owe to the State of Indiana five thousand dollars, subject to a defeasance, reciting that Robert John had been duly appointed collector of the county of Franklin, and if he should well and truly perform the duties of his office of collector, obligation to be void, etc. It then averred that Robert John took upon himself the duties of collector, and that he did not well and truly perform his duties, in this, that under color, and by virtue of his office, he seized and levied upon a quarter section of land, the property of Charles Cone, on a pretext that a tax of one dollar and seventeen cents was due on said land, and unlawfully and without authority sold the same, in violation of his official duty, and subsequently made a deed therefor to the purchaser. The declaration proceeded to aver, that at the time of such levy and sale no tax was due on said land. It further averred, that by the laws of the State of Indiana goods and chattels, found upon a tract of land, were first liable to seizure for taxes, and that there were goods and chattels on the land so sold sufficient to pay the taxes claimed to be due, which was known to the collector; that he refused to demand payment of the resident on the land, and

did not, as by law, he was bound to do, return that there were no goods and chattels to make the tax due. It further states, that in consequence of these illegal proceedings, Charles Cone was put to great trouble and expense, in defending an ejectment brought against him by the purchaser at the tax sale, in which defense Cone finally succeeded. It further averred, that for breach of said bond, the law of Indiana provided that suit should be brought in the name of the state, for the use of the party injured, against the collector and his securities, and that the party injured should recover treble damages and full costs and charges. For these causes averred a forfeiture of the bond, and demanded to recover, etc.

*The plea negatived all the allegations and averments of [218 the declaration, upon which issue was joined.

In the common pleas, the jury found a verdict for three hundred and forty-four dollars. The defendants moved, in arrest of judgment, that the action, as set forth in the declaration, was not maintainable in the courts of Ohio. The motion was overruled, and judgment rendered for treble the damages assessed by the jury, and costs, and the defendants appealed to the Supreme Court.

Upon the trial in that court, the plaintiff gave in evidence the bond, with proofs of the seizure and sale of the land, and that a tenant resided upon it, having goods and chattels, of whom tax was never demanded. The return of the collector, the laws of Indiana, and the proceedings in ejectment, were also given in evidence. The plaintiff then offered to give evidence of his expenses and trouble incurred, in consequence of the sale and suit of the purchaser, to which the defendants objected, and moved the court to overrule the evidence given, on the ground that the case made was not one that could be sustained in the courts of Ohio. The evidence was accordingly overruled and rejected, and the plaintiff became nonsuit, with leave to move for a new trial. This motion was made, and the question, whether the decision of the court, overruling and rejecting the evidence, was, or was not erroneous, was adjourned here for decision.

CASWELL and STARR, for plaintiff.

HAMMOND, and MORRIS & DRAKE, for defendants.

Judge WRIGHT delivered the opinion of the court:

On the trial of this cause, all the evidence offered by the plaintiff, in support of the issue on his part, was objected to, and ruled out, upon the ground that the suit was brought to enforce a penal law of Indiana. The plaintiff then became nonsuit, and now moves to set aside the nonsuit and for a new trial, because the court erred in rejecting the evidence.

The case presents the single inquiry, whether the plaintiff's ac-
219] tion is founded upon a penal law of Indiana? No *one can read the declaration without observing that the bill of the plaintiff, as set forth, requires of the court, not only the application of the local law to the construction of the contract, but to give effect to a law of that state inflicting a penalty. It has been frequently decided, and is now settled, that the penal laws of one state can have no operation in another state, or be enforced by the courts of another. Penal laws are strictly local, and affect nothing more than they can reach. 1 H. Blk. 135; Foliot v. Ogden, Cowp. 343; 14 Johns. 340.

The right of the plaintiff to recover, rests upon the matters without the bond. The provisions of the statute laws of Indiana are introduced in the declaration, as the foundation of the plaintiff's right. He seeks to recover on the bond given to the State of Indiana, because he has been injured by the misfeasance and false return of a public officer of that state. The common method of proceeding in such cases, in this state, is by action on the case. The right once established at law, you may then sue on the official bond, if the injury complained of be such that the securities are held for it. The claim here is to resort to the bond in the first instance, and charge the security before any default of the principal is established. This claim to change our law of the remedy on bonds, is sought to be sustained on the statute of another state. Can the practice of our courts be controlled by the legislative acts of a sister state? The plaintiff sets forth in his declaration, that by the law of Indiana, it is provided that for the illegal and fraudulent acts of a collector, a suit is given to the party injured, to sue upon the official bond; to recover treble damages, full costs and charges, by reason of which an action hath accrued to him. The provision of the law relied upon, is this: "That if any person shall be injured, or sustain damage by a false return of any collector, made to any precept under the provisions of this act, or other illegal

or fraudulent acts of such collector, such individual, upon suit to be brought against such collector and his securities, upon their said bond, for the use of such individual, shall recover treble damages, and full costs and charges." If, instead of an action on the bond, the legislature had provided that these treble damages, costs, *and [220 charges, should be recovered in an action of debt, no one would have doubted but the action was penal. Is its character changed by authorizing the suit to be brought on the bond, and against securities as well as the offender? We think not. A state can enforce its contracts in our courts, the same as an individual suitor; but the remedy must be afforded according to our laws and practice. 1 Ohio, 259; 1 Johns. Cas. 139; 3 Johns. 263; 14 Johns. 340.

The counsel for the plaintiff confidently relies upon the case of Dorrison v. Chaplin, 7 Conn. 244. I have not seen the case, but the state of it, as quoted, does not seem to conflict with our opinion. It merely decides that Congress can not constitutionally confer upon the state courts, jurisdiction to enforce the penal laws of the United States. That court thought there was a broad distinction between such suits and actions to enforce penal statutes; and so we think. Scofield v. Canfield, 4 Johns. 340, is also relied upon for the plaintiff. It seems to us an authority for the defendants. The court refused to allow a defense under a penal law of Connecticut, to affect a contract made in that state, subject to the law, and which, it sued there, it was claimed would have avoided the contract. The United States v. Lathrop, 17 Johns. 261, decided that a state court had no jurisdiction of the criminal or penal laws of the United States; and that Congress had no constitutional right to confer such power.

Upon the whole, it seems to us very clear that this action is founded upon a penal statute of the State of Indiana, whose authority is limited to the territory and courts of that state, and that the nonsuit was properly entered.

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*Lessee of William M. Cartney v. John Reed. [221

Fi. fa. issued and levied on lands after the defendant's death, sheriff's sale confers no title.

Reserved in the county of Clark.

By the COURT:

This case is submitted to the court on an agreed statement of facts, and it seems to us that there is one fact agreed which is decisive of its merits. The plaintiff claims as purchaser at sheriff's sale, and produces the sheriff's deed as evidence of title. The judgment under which the sale was had was rendered in Champaign county in favor of the Dayton Manufacturing Company *v.* Jason B. Coleman and others, in July, 1817. The said Coleman died intestate in the year 1821, and the *fi. fa.* under which the levy upon the premises was made was issued on October 14, 1828. The property was levied upon as the property of Coleman, who had been dead about seven years; his lands, if he had any, had descended upon his heirs, and no *scire facias* had been taken out to revive the judgment against them or against the terre-tenants. This execution was improvidently issued. A sale under it would confer no right upon the purchaser. This question was fully considered by this court in the case of Lessee of Massie's Heirs *v.* Long, etc., 2 Ohio, 287, where it was held that such sales were of no validity. Without examining the other points made, we are satisfied that upon this the defendant must have judgment.

222] *BANK OF ST. CLAIRSVILLE *v.* S. SMITH, O. WELLS, AND OTHERS.

Notes under seal, for the payment of money, negotiated before due, in good faith, are to be regarded as commercial paper, and the makers can not avail themselves of any breach of confidence, by one of the parties, in filling them up and putting them in circulation.

THIS cause came before the court upon a motion made by the plaintiffs for a new trial. It was adjourned from the county of Belmont upon the subjoined state of facts.

This suit was founded upon a note under seal for seven hundred dollars. Smith, one of the defendants, set up, by way of defense, that he executed and delivered the note as an escrow. At the time it was signed by Smith it was left blank for the amount. Smith stipulated that it should not be filled up for more than two

hundred dollars, and Wells, for whose use it was made, promised that it should not be filled up for a greater sum. Seven hundred dollars was inserted, and the note was discounted by the bank without any knowledge of the private agreement between Smith and Wells.

At the trial the court instructed the jury that upon the facts alleged, if proved, Smith could not be held liable, and for this, charged to be a misinstruction, a new trial was asked.

GOODENOW and HUBBARD, for plaintiff.

TAPPAN, for defendant.

By the COURT:

The charge to the jury in this case was grounded upon the authority of Pawling and others *v.* United States, 4 Cranch, 219. That was the case of an official bond delivered by one of the obligors, a surety, to his co-obligor, upon the condition, expressed only in parol, that it must be executed by certain other individuals named in the body of the bond as obligors before it should become obligatory, and it was never executed by some of these parties. Upon reconsidering the case before us, the court are satisfied that the decision relied upon does not sustain the charge given.

*In that case the bond was not complete when signed by [223 a part of the obligors; on its face it contained evidence that it was to be signed by others who had not signed it. Besides, it was not a bond direct for the payment of the money, but for the performadce of a collateral condition. The case turns now upon the question whether notes under seal, made for the payment of money in Ohio, are to be assimilated to commercial paper or to common law bonds. If the former, then it is well settled that he who reposes the first confidence must bear the ultimate loss. And we believe it ought to be so. When notes under seal for the payment of money at a day yet to come, complete upon their face, are negotiated in good faith, they should be treated as commercial or business paper, and all the incidents of such paper should attach to them. The statutes of the state give them a negotiable character, and we but follow their indication in so regarding such notes. There was error in the charge, and a new trial is awarded.

WALTER ARMSTRONG v. THE CITY OF CINCINNATI.

Compensation for damages for opening alleys in towns under town ordinances can not be sought in equity, nor relief granted against the collection of regular assessments.

THIS cause was adjourned here from the county of Hamilton. It was a bill in chancery, in which the complainant alleged that he was owner of one-half of lot No. 61, in the city of Cincinnati, being part of the block of lots situate between Third and Fourth and Main and Sycamore streets. The complainant, with other owners of property in this block, united in petitioning that a twenty-foot alley should be opened between them from Third to Fourth street, and that the land should be equally appropriated from the east and west ends of the lots, except complainant, who was to be paid the full value of his ten feet, the residue to be paid for by contribution.

That subsequent to this a second petition was agreed upon, and signed by all the parties except the complainant, praying for a 224] ten-foot alley only, on the ordinary terms of mutual *contribution according to the advantage received. Under this petition the ten-foot alley was opened, and the whole ground taken from complainant. That the appraisers made a mistake and only appraised five feet, valuing it at eighty-seven dollars and fifty cents, and that afterward the assessor of contribution apportioned two hundred dollars and seventy-four cents upon complainant, for which suit had been brought before the mayor and judgment recovered, under the city ordinances, and process issued to sell the lot to make that sum. The bill prayed general relief and an injunction. The defendants demurred.

MOREHEAD, for complainant.

STORER and FOX, for defendants.

By the COURT:

The object of the bill is not to enjoin opening the alley, but to obtain a decree for compensation for alleged damages. In other words, to obtain all the advantages of the alley and be paid into

the bargain. This can not be a case for relief in equity. Whatever remedy the complainant may claim is to be obtained at law, and is given by section 13 of the law of January 26, 1827, incorporating the city of Cincinnati.

The proceedings before the mayor to enforce the collection of the assessment are regulated by the city ordinances. If irregular, the remedy for correcting them is at law, not in chancery. No special grounds making a case of equitable jurisdiction is presented. Here no irregularity is complained of. The bill must be dismissed.

SYMMES *v.* THE CITY OF CINCINNATI.

THIS case originated in the same transactions as the foregoing, and depended upon the same principles. Bill dismissed.

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*ANDREW DEWIT *v.* WILLIAM GREENFIELD. [225

When, in an action of slander, a justification is pleaded, and an attempt made to prove it, evidence may be given of the plaintiff's general bad character, but not of his character in any single particular.

Words spoken after a term of court commenced, action brought to the same term, declaration filed generally, or of the term. No exception allowed.

THIS cause was adjourned here for decision from the county of Huron. The points arising on the case are stated in the opinion of the court.

HIGGINS, for plaintiff.

G. SWAN, for defendant.

Judge WRIGHT delivered the opinion of the court:

This is an action of slander—the charge, perjury. The defendant pleaded not guilty, and notice of justification, that the words

are true. At the trial, the defendant having offered evidence to support his justification, then offered to prove the general bad character of the plaintiff for truth and veracity. This evidence being objected to, was rejected by the court; and a new trial is now asked, because the court erred in rejecting that evidence.

The question presented on this motion is one of some difficulty. The reported decisions of other states and countries are very contradictory upon the point. We have no reported case in Ohio, on the general question; and it is asserted, and we believe truly, that the decisions in the common pleas in different sections of the state, and even of the Supreme Court on the circuit, are not always uniform. This seems to enforce upon us the necessity of adopting some of the various rules as the law in such cases. The action seeks compensation in damages for injury to reputation. A person of disparaged fame is not entitled to the same measure of damages with one whose character is unblemished. 2 Stark. Ev. 369; 1 Maule & Sel. 284. The character of the parties is directly in issue, and the only difficulty seems to be, to settle a practice for this state, out of the conflicting authorities, the nearest conformable to our notions of law and justice.

Under the general issue, the defendant, in mitigation of damages, 226] may prove that the plaintiff, at the time of speaking *the words, was under a general suspicion of having been guilty of the charge imputed to him. 3 Stark. 577; 2 Camp. 251; 1 Maule & Sel. 284; 1 Pick. 1. He may also give evidence of the general bad character of the plaintiff. This the plaintiff may rebut by evidence of his general good character. 3 Stark. 369, 878. And this doctrine, we believe, is now admitted law in a majority of the United States. 2 Cow. 215; 1 Root, 354; 2 Root, 149; 2 Hay. 222; 1 Nott & McC. 268; 3 Mass. 546; 6 Mass. 514; 14 Mass. 275; 3 S. & R. 336; 2 Marsh. 372.

Where several pleas are pleaded, as in this case, not guilty and a justification; and as the jury is sworn to try the several issues, either party is at liberty to introduce the same evidence under each issue, that he might introduce if that issue stood alone. Therefore, after an attempt to prove a justification fails, it is competent to inquire into the plaintiff's general bad character, the same as though no attempt had been made to prove the special plea. But spreading a plea of the truth of the words on the record in justification, is always an aggravation of the damages

if not proven. Where the defendant has given any evidence in support of a justification in such cases, the plaintiff may introduce proof of his general good character to rebut the presumption of guilt. In all the foregoing cases, the inquiry must be confined to the *general good or bad character* of the party in society as an honest and upright man. The usual questions put are: How long the witness has known the party, and what his general character has been? 2 Stark. 366. You may not, except in the words put, inquire of the character of a party as to particular facts, or in respect of particular things. A man is supposed always ready to sustain his general character, but not to meet particular reports. 3 Stark. 877; 2 Marsh. 372. It has heretofore been decided by the Supreme Court, on the circuit, that proof of facts and circumstances of suspicion, not amounting to a justification, which led the defendant to utter the slander, may be proven under the general issue, to lessen the degree of malice and mitigate the damages. This rule we do not intend to impugn. 1 Bin. 92, n.

If the question asked by the defendant on the trial of this *cause had been confined to the general character of the [227 plaintiff, it would have been competent, but the question goes further, and seeks information of the plaintiff's character for truth and veracity. In that shape it was incompetent. It would evidently be improper for a prosecutor to seek to prove a person guilty of perjury by proof of his general bad character for truth and veracity; and the same principles of evidence apply to a justification in slander. The evidence was properly rejected.

Another reason is urged for a new trial, viz: that the declaration is entitled of October term of the common pleas generally, when the words relied on were proven to have been spoken on the second day of the term. The writ in this state forms a part of the record, and indicates by its date the commencement of the suit. It is not pretended the words proven, in point of fact, were spoken after suit brought; but we are asked to set up a legal fiction, that the declaration entitled in its caption generally, of a term of the court, by relation extends to the first day of the term, and so control the matter of fact! To impart to falsehood, in a court of justice, a power and efficacy which we deny to truth! We see nothing in this case to require of us the performance of so humiliating a duty.

HANLY, WRIGHT, AND ROONEY v. LEVIN.

Declaration by *prochein ami*, but record does not allege plaintiff to be a minor. Defendant presumed of age, and the procuratorship rejected as surplusage. Minority is a matter of fact to be litigated upon pleadings.

In trespass, pleas not guilty and justification, verdict guilty and damages assessed, justification not noticed, it is error.

Verdict not amendable, in matter of form, in the Supreme Court, after writ of error brought. After judgment is reversed on a verdict, in a proper case, it may be amended, in the court of common pleas, where it was rendered.

THIS was a writ of error to the common pleas of Hamilton county, adjourned here for decision, from the Supreme Court of that county.

The case was this: Levin brought an action of assault and battery against Hanly, Wright, and Rooney. The terms of the writ were, that the defendants be summoned "to answer to Lewis C. Levin, by his next friend, Edward Hedge, in a plea," etc. The declaration set out, that the defendants "were summoned to answer to Lewis C. Levin, who, by leave of the court, appeared by his next friend," etc. The declaration was subscribed, "James F. Conover, plaintiff's attorney."

228] *All the defendants joined in a plea of "not guilty." Hanly pleaded a separate plea of *son assault demesne*, upon which issue was joined. Wright and Rooney also pleaded separately that Levin and Hanly were fighting together, and they interfered only for the preservation of the peace, and upon these pleas issue was joined.

The verdict of the jury was in the following words: "We, the jury, find the defendants guilty, as the plaintiff, in declaring, hath alleged, and assess the damage sustained by the plaintiff to three hundred and fifty dollars.

Judgment for the plaintiff, on the verdict, to reverse which the writ of errror was brought.

The errors assigned, were:

1. That the record did not show that the plaintiff was an infant.
2. That the pleadings were subscribed by the attorney.
3. That there was no finding of the jury upon the special pleas.

J. F. CONOVER, for defendant in error:

The first error assigned is as follows: "In that it does not ap-

pear thereby, that the said Lewis C. Levin, the plaintiff, was a minor, or that any legal cause existed for the prosecution of the said suit, in the name of the said Hedge, as the next friend of said Levin."

The mere statement of this error is its own best answer. If it does not appear by the record, that Levin was a minor, the court can not presume that he was, and there is certainly no error on this behalf, in the record. The record nowhere shows Levin to be a minor. And the court can not look beyond the record itself. This point is so well settled, that their honors, Judges Hitchcock and Wright, would not hear an argument upon it, at their late sitting in Hamilton county. See also 2 Bac. Ab., title Error, 489, Phil. ed., where it is laid down, that if errors did not appear by the record, even "though the matter assigned for error should be proved by witnesses of the best credit, yet the judges *would not ad- [229 mit of it." See also Id. 486; 2 Tidd's Prac. 1051; 2 Saund. 101, n. 1.

With regard to the introduction of the name of Edward H. Hedge, as Levin's next friend, admitted by leave of the court, it is unobjectionable on three grounds: 1. Because it is mere surplusage, and therefore does not vitiate. Jacob's L. Dic., title Verdict; 3 Saund. 308; 1 Chit. Pl. 218, 233, 234; 1 Arch. Pl. 160. 2. Because it was admitted by leave of the court, and the court is presumed to do what is right where it has jurisdiction. 2 Starkie's Ev. 802, 803; 1 Arch. Pl. 178. 3. Because it might have been taken advantage of by special demurrer, and whatever can be taken advantage of by demurrer or abatement is cured by verdict. 2 Bac. Ab. 492; 1 Saund. Pl. 2; 1 Chit. Pl. 547; 1 Arch. Pl. 178; 1 Saund. 227, 228, n. 1; 1 Day's Cas. in E. 186, n.

From the foregoing facts and authorities it is clear that the arguments and authorities of plaintiffs in error's counsel do not apply under this head. Nor do his authorities, in several instances, support the points he represents—viz: that from Com. Dig., title Pleader, 2 C. 1, 556. No authorities that I can find, require that the record should show the party suing to be of full age. If the record does not show the contrary, the party's competency to sue is presumed of course. If he should not be competent, advantage must be taken at the trial, by abatement or demurrer. 1 Arch. Pl. 539; Id. 178.

The second error assigned is in these words: "In that it appears that the said Levin prosecuted said suit in the name of said

Hedge, or his next friend, but nevertheless the said proceedings, to wit, the declaration and the several replications to the defendant's several pleas, are all filed by the attorney of said Levin; whereas, by the law of the land, if said Levin was a minor, he could not appear, nor prosecute, by his attorney."

The learned and important case of Apthorp *v.* Backus, Kir. Conn. 407, puts this objection, as well as those assigned under the first head, completely to rest. The argument, upon all these matters, is there most fully and learnedly gone into, by Chief Justice Law and Judge Ellsworth. It is there expressly decided, that an in-
230] fant's appearance by *attorney can not be taken advantage of after verdict. The whole of this highly important case is recommended to the special consideration of the honorable court in bank, as covering the whole ground of the errors assigned in the present case, and as being amply sufficient to sustain the judgment and verdict. See also 1 Amer. Dig., title Verdict, under Connecticut head, sec. 2, p. 385; 1 Bing. Inf. 126; Cone *v.* Bowles, 1 Salk. 205.

But it will be perceived that this second assignment of error also assumes that Levin was a minor, though no such fact appears by the record. And the statement of the opposite counsel, in his argument, that such fact may be inferred, belongs to his own fancy, and to no law that I can find. If, however, such an inference can be acted on by the court in bank, the case in Kirby, 407, is perfectly satisfactory. It is an American decision, by very eminent judges, and therefore entitled to much more weight than foreign decisions. See also Bing. Inf. 126.

The statute of jeofails of Ohio is quite as broad as that of Connecticut, or of England, and covers all the errors that are here assigned, even if the errors assigned fully existed in the record.

There is no principle in law more fully established by the best authorities than that all errors are cured by verdict, that might have been taken advantage of by demurrer, abatement, or any other special plea. 2 Bac. Ab. 492; 1 Saund. 227, 228, and particularly note 1; 1 Arch. Pl. 178; and numerous authorities there cited; 1 Pet. Cond. 326, notes.

Advantages of personal disabilities, of either plaintiff or defendant, must be taken by plea in abatement. 1 Tidd's Prac. 684, 685; Arch. Pl. 539; 1 Saund. Pl. 2; 2 Bac Ab. 492; 1 Chit. Pl. 547; Bing. Inf. 127; 1 Salk. 93.

There is, however, another ground on which the plaintiffs in error must fail to support their assignment of errors. The defendants all pleaded generally in bar, and after a general plea in bar, no personal disability of the plaintiff can be taken advantage of on error. 2 Bac. Ab. 492. This case is put: "If a *feme covert* bring an action in her own name, *per attornatum*, and the defendant plead in bar to the action, *he shall never afterward as- [231 sign the coverture for error." See also 1 Arch. Pl. 177, Gould's edition.

The third error assigned is as follows:

"In that there are four distinct issues presented in said record for the finding of the jury. Three of which issues are on the separate pleas of the several defendants; and the jury have passed upon and found but one issue, whereby three of said issues are yet undetermined and have not been passed upon."

The verdict of the jury is in these words:

"We, the jury, find the defendants guilty, as the plaintiff in declaring has alleged, and assess the damages sustained by the plaintiff to three hundred and fifty dollars."

The declaration alleges, that the defendants all committed the assault and battery. To this the defendants all plead, "not guilty," the general issue. This is their first plea. Then they all plead separate pleas of justification.

How it can be correctly said, under this state of things, that the verdict does not cover all the issues, or the whole case, I am unable to divine. The verdict finds defendants guilty as charged in the declaration. This, then, certainly is the same as to say, gentlemen, you have all committed the injury, you are all guilty, you had no justification, no legal excuse, and your pleas are therefore not true. It certainly covers all the issues in the fullest extent. The defendants, by their first plea, put the fact of their committing the injury distinctly at issue. The reason why verdicts are set aside for uncertainty is that they afford no bar to other actions. But there is no such uncertainty in the case before us. The defendants are all found guilty, as they are alleged to be in the declaration. Of course, if they are all guilty on the general issue they can have no justification separately, or legal excuse, and the verdict expresses just as much as if it expressly said so. The following authority shows that this verdict is amply sufficient. In 2 Seld. N. P. (Wheaton's), 1033, are these words:

"If, in an action of trespass, a verdict be found on any fact or title distinctly put in issue, such verdict may be pleaded by way of estoppel in another action between the same parties or their privies, in respect to the same fact or title." The fact of all the 232] *defendants unlawfully committing the assault was distinctly put in issue, and therefore this verdict would be a bar against another action against all or any of the defendants. It is impossible, if they all committed the injury, as the declaration alleges, that any one of them could be justified in committing it. The verdict not only says they were all guilty, but assesses the damages at three hundred and fifty dollars against them all; for they all said, in their first plea, that they were "not guilty." Of course, if the jury had considered any of them justified, or any way legally excused, they would not have assessed damages against them. Can any reasonable man imagine for a moment that it was not the intention of the jury to find all the issues against all the defendants? It is impossible. I can scarcely conceive how the jury could have expressed themselves more clearly, or in language less susceptible of misconstruction. But if the intendment of the jury can be clearly perceived it is sufficient. Eastman *v.* Chapman, 1 Day's Cases in Error, 50; Spencer *v.* Overton, Id. 183; Hawks *v.* Crofton, 2 Burrows, 699, 700; 10 Mass. 64.

The record does not show that leave had been obtained from the court to file separate pleas, though the common formality to that effect is alleged in the pleas themselves. But it is presumed there should have been a special order of court. But the defendants, after pleading generally, notwithstanding the statute, had no legal right to put in separate defenses inconsistent with the general plea. No such construction can be given the statute.

They had no right to put in pleas of justification. Schemerhorn et al. *v.* Tripp, 2 Caine, 108; Smith *v.* Bouchien, 2 Strange, 993; Drake et al. *v.* Barrymore, 14 Johns. 166; 2 Seld. N. P. (Wheaton's), 1029; 1 Saund. 28, n. 2. Their separate pleas, therefore, are mere nullities, and the jury were not bound to notice them. Consequently the separate pleas, and the replications to them, being void in law, the court is bound to regard them as mere surplusage. Jacob's L. Dic., title Verdict; 1 Chit. Pl. 218, 233, 234; 1 Arch. Pl. 160; 3 Saund. 308. If this position be correct, then the verdict applies only to the general issue, and its sufficiency in this behalf admits of no doubt.

*Should the court, however, not regard the separate pleas [233 and replications as mere surplusage and void, I have yet ample authority to sustain the verdict. And I now solicit the special attention of the court to several very important cases, completely analogous to the one under consideration, and which put the sufficiency of the verdict beyond a reasonable doubt.

I shall first refer to the case of Hawks v. Cropton, 2 Burr. 698. In this case the declaration, pleas, and verdict are precisely similar to that of Levin's, and the judgment was sustained. This case first lays down the undoubted fact, "that verdicts shall be favorably construed"—then if the meaning of the jury can be ascertained it is sufficient. Lord Mansfield says, the question is "whether this verdict is so uncertain that the court can not give judgment upon it, but must award a *venire facias de novo?*" He says: "I think the present case is such a clear case, that the court may here give judgment upon the substantial finding; though the clerk may have been irregular and faulty in point of form, it is very clear what the jury meant." The verdict in this case is a general verdict upon two distinct issues. All the judges refer to a case in Hobart, 54, with great approbation, and cite therefrom this "very just rule:" "That though the verdict may not conclude formally or punctually in the words of the issue, yet if the point in issue can be concluded out of the finding, the court shall make the verdict serve." This case is quite full upon the subject, and is of itself, in my judgment, entirely sufficient.

But I shall now cite another yet stronger. The case is an American case, and emanates from one of the best authority. It is, therefore, doubly valuable. I refer to the case of Porter v. Rummery, 10 Mass. 64. Here the whole doctrine is very learnedly discussed by Mr. Justice Sewall, who establishes beyond controversy the sufficiency of the verdict under consideration. In the case of Rummery, issue was joined on two distinct issues, and the verdict is general. The court holds this language, and which is so entirely applicable to the case of Levin, that it can not fail to be conclusive: "In one view of the case, which may be *suggested, this verdict seems capable of a construction, in [234 which it may be understood as comprehending both issues, and sufficiently to warrant the judgment upon it for the tenant. The court are competent to collect the meaning of the jury, from the terms of their verdict, and one verdict may be a sufficient finding

upon several issues"—p. 66. Certainly, the verdict in Levin's case, "may be understood to comprehend all the issues," especially as verdicts are to be favorably construed.

These two very learned and important cases are supported more or less by the following authorities: Hobart, 54; Gostwicke *v.* Mason, 1 Mod. 3; Redman *v.* Edolfe, Id.; Jacob's Law Dic., title Verdict; Eastman *v.* Chapman, 1 Day's Cases in Error, 30; Spencer *v.* Overton, Id. 183; Apthorp *v.* Backus, 1 Kirby, 415; Jaques *v.* Cæsar, 2 Saund. 100, 101; 3 Saund. 308.

"Where the jury in debt on a bond, and *nil debet* pleaded, found *nil debet* to part, and *debet* to the rest, it was held sufficient." Hadley *v.* Styles, 15 Petersdorff Abridgment, 336.

There is a difference where the verdict is founded on a contract and a wrong. In the latter case it is maintainable, if any part of the issue is found. Jacob's L. Dic., title Verdict.

The fourth error assigned is in these words: "In that judgment ought to have been rendered for the defendants, and not for the said plaintiff."

"This assignment is considered as a mere matter of form, and of no consequence whatever. The court is not bound to inquire into errors, if the party does not show them." 2 Bac. Ab. 486.

On a review of the whole case, the honorable court will perceive that all the authorities and arguments of the counsel for plaintiffs in error are based upon false and untenable premises. It was first assumed that Levin was a minor, though no such fact appears upon the record. The arguments and authorities under the two first assignments, all proceed upon this assumption. His next assumption is, that the verdict does not cover all the issues. This is also positively denied, on the reasoning and authorities before advanced. It is manifest, therefore, however much good law the gentlemen may have adduced, that it is not applicable to the present case.

235] *Storer and Fox, for plaintiffs in error, in reply:

The first error alleged is, that the suit is brought in the name of Edward Hedge, as the next friend of Levin, and there is no averment that Levin is a minor.

The reason that an infant must appear by *pro. ami*, and prosecute, is that he is not personally liable for costs, and in all cases

when he does thus prosecute, the *pro. ami* is alone liable. 1 Tidd, 72; Morrell *v.* Pickman, 2 Esp.

In Turner *v.* Turner, Strange, 708, Lord King says, that he could find no case where the infant was held personally liable to pay costs. Hence, in England, none but responsible persons were permitted to sue as the next friends of infants; and they must have been first approved by the courts, or some judge at his chambers.

If, then, the *pro. ami* alone is liable, it is because the plaintiff is an infant; if he is not an infant, his name on the record can create no responsibility on the part of the *pro. ami*, and as it creates no responsibility, it is error for it to be thus inserted.

All the forms require the insertion of the fact that the plaintiff is a minor. 2 Chit. 32; 2 Saund. 117, n. 1. Bingham on Infancy, 120, says, that in the King's Bench the form is similar.

It is a universal principle, that the capacity in which the plaintiff sues must be stated. If he sues as executor or administrator, he must make it appear that the testator or intestate is dead.

If he does not appear to be a minor, it follows that he is represented on the record as of full age; and it is clear, if it does not thus appear, it is erroneous. 2 Com. Dig., title Pleader, 2 C. 1, 556.

There is no legal act that can be done by an infant unless through the intervention of a *pro. ami;* he can not sue, or even file errors on the record. Bing. 122.

Error Second. That even if it could be inferred that the plaintiff was an infant, still, as he has appeared and pleaded by attorney, it is error. Formerly, the appearance of an infant plaintiff, by attorney, was error, but after verdict, the *defect was [236 cured by the statutes 21 Jas. I., c. 13; 4 and 5 Anne, c. 16. The statute 21 Jas. I., c. 13, provides, that "judgment shall not be stayed or reversed, for that the plaintiff in ejectment, or other personal action, being under age, appeared by attorney. The statute 4 and 5 Anne, c. 16, "cures the effect of a warrant of attorney not being filed."

The law as to the appearance of an infant defendant by attorney is unchanged; it is universally held to be error, if he thus appears. 2 Tidd, 70.

5 Com. Dig. 556, "In all actions, real, personal, or mixed, if he

appear by attorney, it is error." Brey *v.* Grobe, Cro. Jas. 10; Bing. on Inf. 123; Sampson et al. *v.* Jackson, Cro. Jas. 641; Dewitt *v.* Post, 11 Johns. 460; Arnold *v.* Sandford, 14 Johns. 423.

The statutes of jeofails of this state is general; it is confined to matters of form, and does not specify the particular defects that are cured as by the English statutes. The same reason holds, it would seem, to reverse the judgment when the plaintiff appeared by attorney, as when the default appeared, and more especially, as the defendant is literally taking an undue advantage, when he is permitted to obtain a reversal of a judgment on that ground. The plaintiff is bound to bring his action in legal form. The defendant is compelled to answer at all hazards; hence the propriety of requiring the plaintiff to commence his suit in a proper manner.

Error Third. For that all the issues are not found by the jury, nor have they passed on the whole case, as the several defendants have pleaded separate pleas, which are found by the verdict to be true and untrue.

When the jury find less than the whole matter in issue, a "*venire facias de novo*" will be granted. 2 Tidd, 831. In Hooper *v.* Shepherd, 2 Str. 1089, the judgment was reversed because the jury did not find a verdict to cover the whole case. The action was on a charter party, at fifty guineas per month; plaintiff stated that six hundred and fifty-two pounds was due for the whole one hundred and fifty-two pounds, ten of which had been received, and the remainder was five hundred pounds, for which the suit was brought. The defendant pleaded that he had paid at the rate of 237] fifty guineas per *month for all the time the ship was in his service; issue was taken on the plea; the jury decided that three hundred and fifty-seven pounds remained unpaid; but say nothing as to the rest of the five hundred pounds.

In Rex *v.* Dean of St. Asoph, Lord Mansfield says, "If the verdict omitting finding anything within the province of the jury to find, no judgment could be given, and there must be a *venire de novo.*" 3 Term, 426, in notes.

"A verdict that finds part of the issue and finding nothing for the residue; this is deficient for the whole, because they have not tried the whole issue wherewith they are charged." Thomas' edition of 3 Coke Lit. 539. "As an information for intrusion into a house and one hundred acres of land, if the verdict finds against

the defendant for the land and says nothing about the house, it is void for the whole." Id.

"In trespass against husband and wife, for beating his horse and other trespasses, a verdict that the wife beat the horse and for the residue not guilty, but says nothing about the husband, whether he beat the horse or not, is bad." Drury *v.* Dennis, Yelverton, 10 C. And so, in debt for seven pounds if there is a verdict for six pounds, and nothing for the residue. Finymore *v.* Sanky, Cro. Eliz. 133.

If an action against three who pleaded personally and all the pleas are not found true or certain, the verdict is bad. 5 Com. Dig. 504, title Pleader, S. 19.

In an action of trespass against a number of defendants who severally plead not guilty, if the jury find a verdict for plaintiff, omitting to mention two of the defendants, the court will set the verdict aside as not comporting with the issue. Kilboun *v.* Wateron et al., Kirby, 124.

In Von Bethysen *v.* Dewitt et al., 4 Johnson, 313. "If no damages are assessed upon the breaches assigned in the plaintiff's declaration, it is error."

In Patterson *v.* United States, 2 Wheaton, 225, it is decided "that a verdict is bad if it varies from the issue in a substantial matter, or if it find only a part of that which is in issue. The reason of the rule is obvious, it results from the nature and the end of pleading; whether the jury find a general or a special verdict, it is their duty to decide the *very point in issue, and although [238 the court in which the cause is tried may give form to a general finding, so as to make it harmonize with the issue, yet if it appears to that court or the appellate court that the finding is different from the issue, or is confined only to a part of the matter in issue, no judgment can be rendered upon the verdict."

In my judgment, says Judge Story, in Steams et al. *v* Banet, where a verdict is not expressed substantially in the terms of the issue, the cause ought to be extremely clear, that should induce the court to make it the ground of a final judgment. 2 Mason, 173.

Judge LANE delivered the opinion of the court:

The two first points are easily disposed of. The plaintiff has declared by *prochein ami*, but the record nowhere shows that he is a minor. Unless such fact appear, we must presume him of age,

and may well reject the curatorship as surplusage, which does not vitiate.

The second plea, upon which the second point is predicated, sets forth the hypothetical assumption, correct in point of law, that if a minor he should sue by *prochein ami*. Minority is a fact which should be distinctly averred, that it may be traversed. It is not so alleged, and does not so appear of record, consequently, if true, it can not avail the plaintiff in error.

The third point has given us more difficulty. It is plain that the verdict of the jury should respond to all the questions submitted by the issues, and where an issue is left unanswered no judgment should be rendered. The court in which the verdict is given exercises the power of amending it, and of conforming it to the issue, whenever the meaning of the jury can be distinctly ascertained, and when it appears they have acted and decided on the whole merits. 3 Ohio, 384. It sometimes happens that the finding of one issue concludes the whole, although some are unanswered. The pleas of not guilty and justification in tort illustrate this. The finding of not guilty is enough, since it shows that no facts are proven, which it is necessary to excuse.

239] *In the present case, no doubt would arise but that the court of common pleas, when the present verdict was returned to them, might with propriety have applied it to all the issues, and have amended it, so as to have made it a full answer to each. The intention of the jury is sufficiently manifest, and the verdict contains enough. We entertain the opinion that the verdict *per se*, unamended, is no answer to any other plea than the general one. Had it been "not guilty," by negativing the assault, it would have been a sufficient answer to the justification, for no fact would have been left to justify. But a verdict of "guilty," may, and must be found, before the jury proceed to the other question, and it may be truly found, while the justification is fully proved, and fully available as a defense.

Is it within the authority of this court to make the amendment? By some of the English statutes of jeofails, the authority to amend is conferred in all its latitude, not only upon the court where the judgment was rendered, but in the court to which the record is removed by error. And now, by the English practice, amendments may not only be made in the court to which the error is triable, but the court will disregard such errors as are amendable, and

by intendment will sometimes consider the amendment as made, without any actual alteration of the record. But the statute of Ohio limits the right of amendment to the time before bringing writ of error. And for many years past, it has been held settled, that after the allowance of error, the right to amend is taken away. I am sure this effect is not conducive to justice, and believe, that if the question were new at this time, that the statute might properly receive a different construction. But a majority of the court think themselves bound by this long-continued practice.

Two cases are cited by the plaintiff in error, which deserve notice. In 10 Mass. 66, where an action was disseizin, plea not guilty as to part, and non-tenure for remainder, a verdict of not guilty only, the court rest their opinion upon the point that the state of the record lays no foundation for a verdict for one. But they fully recognize the position, that the court below "might work it into form," and make it answer the justice of the case, and they do not decide the *form of the verdict, as it then stood, [240 was an answer to both pleas.

The case in 2 Burr. 698, seems precisely in point, to show that the verdict is good. A more minute examination of that case, leads us to believe, that decision was made with reference to their peculiar mode of practice, in amending in the court of error, and of holding an error that might be amended not to exist.

Upon the whole, a majority of the court believe that the verdict, until amended, is no answer to the three last pleas, and that it cannot be amended in this court.

Judgment reversed.

TREASURER OF MONTGOMERY COUNTY, FOR JAMES LOWRY, *v.* J. AND L. KEMP.

Decision in Stewart and Chaplin v. Treasurer of Champaign County, recognized and sustained.

THIS cause was adjourned here for decision from the county of Montgomery. It was an action of debt, upon an administrator's bond, executed in 1824, brought against the administrator and

his securities. The declaration set out the bond and condition, and averred that, after administration granted, the administrator received a large amount of assets. It is also alleged, that Lowry, for whose use the action was brought, had recovered judgment against the administrator for a sum specified, due from the intestate; that a writ of *fi. fa.* had issued against the goods and chattels of the intestate in the administrator's hands, to be administered, upon which the sheriff returned he could find no such goods, and that he had made demand of the administrator, who refused to show him any.

The defendants pleaded various matters, upon which issues were made, but as the case turned upon the validity of the declaration, it is unnecessary to state them.

CRANE, for defendant, insisted that the case of Stewart and Chaplin *v.* Treasurer of Champaign County, 4 Ohio, 88, decided this case.

241] *STODDARD, for plaintiff, maintained that this case was distinguishable from the case cited, and argued that that decision ought not to be held a correct adjudication of the law.

By the COURT:

We are entirely satisfied with the decision in Stewart and Chaplin *v.* Treasurer of Champaign County, and are not disposed to disturb its authority. We think this case can not be distinguished from it. The cause is remanded to the Supreme Court of Montgomery county, with leave for the plaintiff to become nonsuit.

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STEPHEN STEWART *v.* THE STATE OF OHIO.

Indictment for assault with intent to kill, party may be convicted of assault and battery, or assault alone.

THIS was a writ of error, adjourned here for decision from the county of Gallia.

The case was this: Stewart was indicted for an assault with intent to kill and murder. Upon the trial, his counsel moved the

court to instruct the jury, "that if they were of opinion that the facts of the case would not warrant them in finding the defendant guilty of an assault with intent to kill and murder, as charged in the indictment, yet that it was competent and lawful for the jury to find the defendant guilty of assault and battery alone." This charge the court refused to give.

The prosecuting attorney asked the court to instruct the jury, "that if they did not find the defendant guilty of the assault with intent to kill and murder, they must find him not guilty of the whole charge;" and this instruction the court gave to the jury; to all which, the defendant excepted.

The indictment contained but one count. The jury found the defendant guilty of the assault with intent to murder, and he was sentenced to three years' imprisonment in the penitentiary, to reverse which, this writ of error was brought.

*Several errors were assigned; but the opinion of the court [242 is confined to the bill of exceptions.

MURPHY and ALLEN, for plaintiff in error.

Judge LANE delivered the opinion in the court.

It is assigned for error, that the court refused to charge the jury, that in an indictment for an assault with an intent to kill, they might find him guilty of simple assault and battery, without any such intention; and in charging that in this case, if the jury found him guilty at all, it must be guilty of the whole accusation.

A doubt has been raised, whether the bill of exceptions is taken to the refusal to charge, as well as to the actual charge; but a majority of the court believe it is, although somewhat informal, sufficiently applicable to both.

We are all of opinion that the charge was erroneous. That a jury may find a verdict of guilty for part, and acquit for the residue; that where an accusation for a crime of a higher nature includes an offense of a lower degree, the jury may acquit him for the graver offense, and return him guilty of the least atrocious. The cases and examples are collected in 1 Ch. Cr. Law, 638, and there is no foundation in this country for the distinction made in England on this point, between felonies and misdemeanors; for here, an indictment for the higher offense rather adds to than subtracts from his privileges.

Still, we can not say that the defendant might not be prejudiced by his instruction, and therefore the judgment must be reversed.

243] *PIATT AND WIFE AND OTHERS v. HUBBELL AND OTHERS.

Where, upon petition for partition, commissioners are appointed, and report made, possession taken in severalty in conformity with it, and improvements made, though no judgment of confirmation is entered on the report, and although some of the parties were infants, the division appearing to be a fair one, after a lapse of several years equity will not aid to disturb it.

THIS was a suit in chancery to set aside certain proceedings in partition. It came before the court upon bill, answers, exhibits, and depositions, and was adjourned here for decision from the county of Hamilton. The case is stated in the opinion of the court.

STORER and FOX, for complainants.

N. WRIGHT, for defendants.

Judge LANE delivered the opinion of the court:

The plaintiffs are the widow and the owners of four distributive shares of the estate of W. Perry, late of Cincinnati. The defendants are the owners of the remaining share of said estate. William Perry died seized of a block of lots in Cincinnati, a partition of which is the main object of the present bill.

A partition is resisted by the defendants, because they say a partition is already made. In 1814, all the heirs of William Perry united in presenting a petition for partition to the common pleas, of these premises. Mrs. Ferguson and the two Strattons were then under age, but their names were subscribed to the petition by their mother, Mrs. Piatt. The court granted the prayer of that petition, and appointed three commissioners to set off the land, with directions to be governed by the provisions of the act defining the duties of executors and administrators, passed in February, 1810.

At the next term, August, 1814, an order was issued to these commissioners, directing them to make partition, in conformity with

the statute, and make return to the court, at the same term. Those commissioners made return, August 5th, that they "had made the following partition." (See map.) The map follows, containing the division. Next follows the certificate of an oath, dated the same day, before a magistrate, in which they swore that the map exhibits the partition *made by them in compliance with the annexed [244 order. No other proceedings appear to have been had in court; there is no acceptance of the report, no confirmation of the division, no other notice of its return.

Evidence has been taken in this suit for the purpose of showing the fairness or unfairness of this division. The testimony of the commissioners proves, that they embraced in the share set to Hubbell, thirteen feet wide of land, which they supposed would be required to enlarge the street called Western Row, and that they contemplated an alley would be run east and west through the whole block, and they attempted to equalize the value of the respective shares, upon the supposition that these alterations were made. The proof shows a diversity of opinion among the witnesses, as to the equality and justice of the partition, and although it is a subject upon which men are prone to differ, we think the evidence satisfactorily shows that the partition was at that time just.

The plaintiffs insist that these proceedings are entirely void, the report never having been accepted, and no ultimate judgment in partition having been made. By the defendant it is insisted, that although the general law, pointing out the mode of proceeding in partition, requires the second judgment; that these proceedings are under a different statute, vol. xiii. 161, sec. 37, in which no such judgment is contemplated, but under which the partition becomes complete by the act of the commissioners. Or that, at any rate, this is a proceeding by a tribunal having jurisdiction, whose acts are not void until reversed.

We do not think it necessary to decide what is the precise effect of these proceedings. It is evident the partition was in fact made between the parties in 1814, which at that time was equal; and that all the adult parties took possession of their respective shares, and ever since held them in severalty, built upon, and improved them, on the faith of its validity. This court, in chancery, would not disturb a parol partition, originally fair, in which there had been so long acquiescence, and such acts of confirmation.

No difficulty is found in disposing of all the rights, except that

245] remaining in the children of Mrs. Stratton, who were *minors at the institution of this suit. We have been led to conclude, that even to these the same principles are applicable. They were parties to the original partition, and we believe it was fair. Separate possession, the erection of houses, and sales of parts of the property have been had, upon the faith of its validity. If it be invalid, it becomes so from the common mistake of those who managed it—that no confirmation by the court was necessary. If these minors ever possessed the right to set aside these proceedings, the subsequent transactions render it inequitable for them to exert it. We feel, at least, that to produce this effect, they have not the right to invoke to their aid the extraordinary powers of chancery.

The opinion we express, is upon the supposition that the interest of all parties requir es the alley to be opened. The bill, however, makes no such request. The case will be sent to the Supreme Court of that county, to afford an opportunity for the amendment.

Lessee of Muhlenburg's Heirs v. Elias Florence.

Verdict against the weight of evidence, new trial granted.

New trials granted in ejectment where verdict is against defendant more liberally than where verdict is against the plaintiff.

This was a motion for a new trial, by the defendant, in an action of ejectment. The case is stat ed in the opinion of the court.

G. Swan, for defendant.

H. Stanbery, for complainant.

Judge Hitchcock delivered the opinion of the court:

Upon the trial of this cause, in the county of Pickaway, it became important to ascertain the upper back corner of Muhlenburg's survey. In fact, this was the only material question in controversy. On the part of the lessors of the plaintiff, it was insisted 246] that this corner was lost, and they *sought to establish it by

running a line from the lower back corner, which was proven the course called for in the patent, until it should intersect the upper line of the survey extended westwardly. The defendant introduced witnesses to prove the corner at a point between sixty and seventy poles east of the point of intersection. The natural objects called for are four swamp oaks. The witness called had never seen such a corner. Judge Florence stated, that while acting as the agent for the lessors of the plaintiff, in the year 1816 or 1817, and while attempting to ascertain the back line of Muhlenburg, he saw, at the point contended for by the defendant, a barren oak stump, marked as a corner, and another tree of the same description, marked in the same manner, had been cut down, and was lying nearly against a fence. This stump and tree were in a field, and in possession of a man by the name of Pritchard. Florence, although acting as the agent of the plaintiff, did not examine, particularly, the marks on the stump and tree; his sole object being to fix the back line at a place where there could be no controversy on account of interfering claims.

In October, 1817, Sylvester Bourne was surveying in the neighborhood, and was shown a corner, said to be Muhlenburg's, about fourteen rods west of Baldwin's corner. This is the distance between the corners of Baldwin and Muhlenburg, as claimed by defendant. Kinnear, a surveyor, run the line, and noticed the stump, marked as a corner, at the same point; and the same fact was stated by White, another surveyor, who was on the ground in 1831. White further stated, that the mark corresponded with other marks of the survey, except that they were not cut through the bark, so as to ascertain the age by blockings.

It was stated that swamp oak and barren oak are the same timber. There was no proof of any corner west of this, on the north line of the survey extended; but Shepherd, a witness on the part of the plaintiff, stated, that several years since, he found a man by the name of Muir (since deceased), in the woods making rails, who told him that he had chopped down a corner tree, which, at some future time, would make difficulty; and the witness saw a rail with marks similar to those on corner trees. This was near a prairie, *and several rods west of the corner as claimed [247 by the plaintiff, but not at the point of intersection. Nor did it appear, that at, or near the point of intersection, there were any trees marked, although there was timber in the neighborhood of

the description called for. It is now mostly dead and destroyed. Upon this evidence the jury returned a verdict for the plaintiff, whereupon the defendant moved for a new trial, assigning for cause that the verdict was against evidence. The judges who tried the cause, although agreed that the verdict was against the weight of the evidence, yet differed in opinion as to the propriety of granting a new trial. Whereupon the counsel for the defendant moved, that, pursuant to the law in such case provided, the case should be reserved for decision here.

Motions for new trials are addressed to the discretion of the court, and will be granted or refused as the justice of the case seems to require. As a general rule new trials will be granted where the verdict is against the evidence or manifestly against the weight of the evidence. In the case of Curtis and others *v.* Jackson, 13 Mass. 507, the court say, that if the verdict be clearly against the weight of evidence, justice undoubtedly requires the interposition of the court. The only proof of the existence of a corner established it at the point claimed by the defendant. In fact the plaintiff relied upon the absence of such proof, in order that he might be permitted to establish a corner by running the course called for in his patent to the point of intersection. No principle, however, is better established in Virginia military surveys than that this course and distance must be controlled by natural objects. It is true that there would be a great variation in the course of Muhlenburg's back line, if the corner should be established at the point claimed by the defendant. Still if the corner was here originally fixed, it can not now be changed. It is manifest that the back line was not run at the time of the original survey, and the course was only ascertained by calculation. There is no proof of the four swamp oaks, but there is proof of two swamp oaks marked as a corner, and it appears that this corner is within a clearing. Further it must be remembered, that this survey was made in 1795, and the corner trees were
248] *not examined until more than twenty years thereafter. Is it surprising, then, that some of the trees should be gone? Those found, however, are of the description called for, and no other corner is found in the same neighborhood, which could answer to the call of Muhlenburg. The testimony of Shepherd is entitled to but little consideration. He states what he had heard from Muir, and further that Muir was a man in the habit of telling

large stories. Upon the whole, the weight of evidence is manifestly against the finding of the jury, and such was the opinion of the judges who tried the cause. The rule stated would then require of the court to award a new trial, and the justice of the case seems to demand it.

It is said, however, that in actions of ejectment, new trials will not be granted, even where the verdict is not only against the weight of evidence, but where it is against evidence. I am aware that such a principle is laid down in the books. The reason assigned is that the judgment is no bar. A new action may be brought, merely changing the name of the nominal plaintiff. I apprehend, however, that it will be found upon examination that this principle applies more particularly to cases where there is a verdict for the defendant. In such case the situation of the parties is not changed. The plaintiff can again renew his action and recover upon the same evidence which would have entitled him to a verdict in the first instance. He loses nothing by the first judgment but the costs of suit, and these he would probably have to pay, as a condition of the new trial. Where the verdict is against defendant, the reason of the rule ceases. For how is it with the defendant? If judgment passes against him, the possession is changed, and although he commence a new action, still he comes before the jury under less favorable circumstances than before. In ejectment the rule is invariable, that the plaintiff must recover on the strength of his own title, and not upon the weakness of the title of his adversary. If there is any doubt in the case, that doubt must be resolved in favor of the defendant. The defendant being in possession shall not be ousted by a doubtful claim. This being a principle recognized in the action, and it is founded in principles of abstract justice, why shall it be said, that *defendant can not, after verdict against him, move for a [249 new trial because the action is ejectment, when the evidence upon which that verdict is founded goes to prove, not merely that the claim of the plaintiff is doubtful, but that the defendant has, in fact, not only the possession, but also the right of possession? Under such circumstances, to deny a new trial would seem to be manifestly unjust.

So also that courts are more liberal in granting new trials in ejectment, where the verdict is against a defendant, than when it

is in his favor. I refer to Runnington on Ejectment, 398, and 1 W. Blackstone, 348.

Upon the whole, a majority of the court are of opinion that, in the present case, a new trial be ordered at the cost of the defendant.

In the Case of the Bank of Mount Pleasant.

Mandamus mode of proceeding.

In this case, application was made at the Supreme Court in Jefferson county, in 1831, for a rule to be directed to the Bank of Mount Pleasant, situate in that county, to show cause why a writ of *quo warranto* should not issue, to examine and determine if its charter should not be forfeited, for certain alleged misfeasances. The application was made by an attorney of the court, in the name of a private individual, and was adjourned here for decision. The application was refused; but it was ruled as follows:

1. An application for a writ of *quo warranto* against a corporation must be commenced by rule against the corporation to show cause why the writ should not be awarded.

2. The rule must be applied for, by the prosecuting attorney of the proper county, for and in behalf of the state.

3. Application may be made for the rule to the Supreme Court, 250] sitting in any county of the state, previous *notice having been given to the party concerned of the intention to make the application. But the rule must be made returnable to the Supreme Court of the county where the party against whom it is taken resides, or is located, whether the party be an individual or a corporation.

4. Upon the return of the rule, the court, upon hearing, will sustain or refuse the application, as circumstances and proofs may show to be right.

5. In case the writ be awarded, the proceeding must be according to the common law, the ordinance having so directed, and there being no legislation on the subject.

6. If, in a proper case, the prosecuting attorney decline to make

application for the rule, the court will order him to make it peremptorily, or direct it to be made by another person, according to circumstances.

DANIEL S. BELL *v.* SAMUEL MILLER.

Party advising or aiding in committing a trespass, liable though not personally present at the time of committing it.

THIS cause was adjourned from the county of Champaign, on a motion for a new trial made by the defendant. The action was for an assault and battery; verdict for the plaintiff; damages sixty dollars. Three reasons were assigned for a new trial:

1. That the court charged the jury, that if the defendant incited or in any degree promoted the commission of the assault and battery upon the plaintiff, he was liable in this action, though not in a situation to afford any actual aid to the person who committed it.

2. That subsequent to the trial, the defendant ascertained that a material witness examined for the plaintiff was interested in the cause.

3. That the verdict was against both law and evidence.

ANTHONY, in support of the motion, cited 2 Ohio, 169; 2 Stark. Ev. 356, n. 1; 1 Term, 167; Ld. Raym. 274; 3 Wils. 18; 2 New R. 446; 3 East, 599.

*The plaintiff cited 4 Black. Com. 36; Chitty Plead. 67, [251 180; 2 Stark. Ev. 6, 10.

By the COURT:

All concerned in the commission of a trespass are considered principals. An assault and battery may be committed by a party not present, if he be a principal actor in or adviser and promoter of making the attack. If one person employ another to commit an assault and battery or any other trespass, and the act is perpetrated, both are guilty, and both responsible in damages. It was not supposed that this was now a debatable question. There is no error in the charge of the court.

The record contains no proof of the fact that the interest of the witness was discovered after the trial, nor of the nature and extent of that interest. In this state of the case that suggestion amounts to nothing. The same remark is applicable to the complaint that the verdict was against evidence. The evidence is not before this court, and consequently can not be acted upon.

New trial refused.

LESSEE OF DRAKE AND WIFE *v.* RAMSAY AND OTHERS.

Conveyance made by infant *feme covert* may be disaffirmed, whilst action of ejection is not barred by the statute of limitations.

THIS was a motion for a new trial, made by the plaintiffs, in an action of ejectment. The cause was adjourned from the county of Hamilton. The facts are stated in the opinion of the court.

CASWELL and STARR, for plaintiffs.

STORER, for defendants.

Opinion of the court, by Judge LANE:

252] *In 1795, Francis Kennedy contracted to purchase lot No. 406, in Cincinnati, into the possession of which he entered and died. After his death, Symmes leased the lot to the widow for life, and conveyed the reversion to the children. Mrs. Drake is one of these children, born in 1791, married in 1811, and attained majority in 1812. In 1807, the widow and children united in a conveyance of the lot to the defendants and those whose estate they held, but Mrs. Drake, if she then executed the deed, did not acknowledge it until 1809, when, having attained the age of eighteen, she acknowledged the instrument, probably under the mistaken belief that she possessed the requisite power to convey. The lot was sold at its full value, and the whole was the subject of a family arrangement between the mother, the heirs, and the guardians of such as were minors. By this arrangement, the evidence showed the mother was to have the use or interest of one-third the money during her life; that this sum was comprised in a

note given to her by Anderson, one of the purchasers, the interest of which was paid to her until her death, in 1816.

After Mrs. Kennedy's death, the heirs, including Drake and his wife, met and divided her property, and appointed one of their number a trustee to collect the note from Anderson; in 1818 and 1827, the trustee paid to Mr. Drake his share of the note, and took receipts which are severally stated to be in part and in full of Mrs. Drake's share of Mrs. Kennedy's estate.

It was shown, in proof, that Mr. and Mrs. Drake, at all times since their marriage, have resided within eight or ten miles of Cincinnati. They have not been heard to complain of any unfairness in the sale, or even to speak of the transaction; except that in 1827, Mr. D. being applied to for a release, declined, saying, "he would look into the business."

Upon this state of facts, the jury were instructed by the court to return a verdict for the defendants; to set aside which and obtain a new trial is the object of this motion.

It is conceded by counsel in this case, that the deed of Mrs. Drake, having been executed during her minority, is voidable, and that when she attained full age, she possessed *the power [253 of resuming the estate. The questions which the parties intend to present, depend upon the effect and operation of deeds by infants, and the mode in which the law permits them to be rendered void.

What is necessary to avoid an infant's deed? Chancellor Kent, 2 Com. 195, notices it as "remarkable" that so much uncertainty rests upon this question at this day. That so late as 1818, the present Lord Lyndhurst, and the present chief justice of the common pleas, while sergeants, conducting the case in 8 Taunt. 36, should treat the matter as so unsettled; one affirming that every such contract binds the adult until avoided; the other insisting that no such contract possesses any validity, until after confirmation. The chief justice who tried the case, treats the contract as valid, until some act of disaffirmance is shown, but other cases seem to be decided on the supposition that until affirmance, the contract is void. Co. Lit. 51; 1 Greenl. 11; 11 Johns. 539; 14 Id. 124; 11 Serg. & Rawle, 305, cited by Kent, *ut supra*. But to us it appears, that the word voidable, *ex vi termini*, shows that such a deed transmits the title; and that after vesting it, it continues in the grantee until divested by some act of the maker of

the deed. Some of the books apparently suppose that the act of avoidance must be of equal solemnity with the act of grant. 4. Day, 51; 14 Johns. 124. But I can not find it to be expressly decided, except in case of feoffments, where a peculiar feudal principle renders it necessary; we believe that an entry, suit, or action, a subsequent conveyance, an effort to restore parties to their original condition, or any act unequivocally manifesting the intention, would render the avoidance effectual, and that the institution of, this suit is an act fully possessing this character.

But it is strenuously urged that the power of disaffirmance must be executed "in a reasonable time," in some short period after the infant becomes of age. The cases cited, do not appear to us to establish this proposition, nor do we believe it supported by any sound reasons. The power to rescind contracts at law and chancery from the omission of one of the parties, strikes us as not analogous to this; there the contract is already void, if the party 254] elect to consider *it; here it is not void, until made so by the act of the party. The right to abandon in cases of insurance is regulated by mercantile securities, and governed by rules peculiar to itself. The case of Cecil v. Salsbury, 2 Vern. 224, related to a power to retract an offer, which must have been exercised during the pendency of a suit, and was accompanied with acts recognizing the offer after the infant attained age. The case in 2 Term, differs from the present in this, that it is the example of a privilege, not created by law, but originating in contract, to be exercised *on*, not *after*, he attained full age. And in the case, 6 Com. 498, so strongly relied upon by the defendants, we find, if we may trust to a digest (for the original is not now accessible to us), that thirty-five years had elapsed from the making of the deed to the attempted avoidance; a period longer than the statute of limitations, and of itself sufficient evidence of confirmation, without adverting to other circumstances connected with the possession of the note for the purchase money. In our opinion, lapse of time may frequently furnish evidence of acquiescence, and thus confirm the title, but of itself, does not take away the right to avoid, until the statute of limitations take effect. In this position we are countenanced by decisions of the most respectable courts. In 11 Johns. 539, twelve years; in 14 Johns. 124, eleven years had elapsed from the time of the sale; in 4 Day, 57, fifteen years had

expired; and in a case reported in 3 Marsh. —, the term of twenty-eight years intervened before the deed was avoided.

We are, therefore, led to the conclusion that since the statute of limitations does not yet operate, the plaintiffs possess the right to disaffirm the deed of Mrs. Drake, unless they have extinguished this privilege by something amountiug to a confirmation. I am prepared to admit this effect may follow, either an express recognition of the validity of the deed, or from any act done under a knowledge of their rights, which demonstrates a willingness to be bound by the contract; or by continuing, after acquiring such knowledge, to enjoy any benefit, profit, or privilege, under the contract, after the infant has attained full age.

*But I look in vain, through this transaction, for evidence [255 of any such assent. There is no satifactory proof that Mrs. Drake was apprised of her rights that she knew she possessed the power to disaffirm; but the testimony raises the suspicion that she believed she was bound to convey, because it was said the land was sold by order of court. Besides, she has at all times been under such disabilities that no binding ratification could be made except by deed. It does not appear that Drake knew his wife was ever a proprietor in the lot; the receipt of his share of the purchase money happened long after the sale, when the debt was embodied in the note from Anderson to Mrs. Kennedy, to which his wife was entitled as heir; and neither his receipts, nor any other act in proof, lead to the belief that he knew from whence it arose, or that he claimed it in any other character.

New trial granted.

WILLIAM FLEMING AND OTHERS *v.* JAMES T. DONAHOE AND OTHERS.

5o 235
56 248
5o 255
69 280

Previous to the statute of frauds, enacted in 1810, a trust might be created in real estate by parol, and established by parol evidence.

Case upon facts.

THIS case was adjourned from the county of Hamilton. It was a bill in chancery, claiming to set up a trust in a deed of conveyance for real estate. The case made in the bill is this: Robert

Fleming, the ancestor of the complainants, in 1808 held the equitable estate in a lot in Cincinnati, the legal title being in John Cleves Symmes, who, by the direction of Fleming, conveyed the lot to his daughter Mary. The bill set forth that Mary was a cripple, that the conveyance to her was a trust for the use of herself and father during his life, and if she survived, for her use during her life. The father died in 1815. Mary married Donahoe and had a living child, which died a few days old. In 1820, Mary Donahoe herself died. The trust attempted to be set up existed altogether in parol. One of the defendants demurred, others answered deny-
256] ing the original creation of *the trust. Contradictory testimony was taken, and the cause came to be heard on the demurrer as to the defendant that demurred, and as to the other defendants, on the answers and proofs.

STORER and FOX, for complainants.

N. WRIGHT, for some defendants; V. WORTHINGTON, for some, and CASWELL and STARR, for some.

Judge WRIGHT delivered the opinion of the court:

The counsel for the complainants urge, in support of the bill: That inasmuch as it is admitted by the demurrer that the elder Fleming paid the purchase money for this lot and took a deed to his daughter Mary, and so vested in her the fee, that a trust resulted to her father.

It is a general rule that when a father purchases land and takes a deed to a child, it is *prima facie* an advancement to the child, the law presuming such to be the intention of the father. But this presumption may be rebutted, and wherever it expressly appears that the parent intended that the conveyance should not be considered such, then the child takes a trust estate. 2 Mad. Ch. 112; 2 Johns. Ch. 51; 11 Johns. 107. The declarations of both the father and daughter set forth in this case are, perhaps, sufficient to rebut the presumption of law, that the conveyance to Mary was an advancement by her father.

But is there a resulting trust springing out of the facts set forth? If one pays the money for land purchased and takes a deed to another, a trust results, by implication of law to him who paid the money, because he is deemed the real purchaser. This

is analogous to a feoffment at common law, where the use followed the consideration. 2 Atk. 150; 3 Stark. Ev. 1040. Where an estate is purchased in the name of A., and the consideration money is actually paid at the time by B., there is a resulting trust in favor of B., provided the payment of the money be clearly proved. The payment of the money at the time is indispensable to the creation of the trust. 4 Kent's Com. 300, and the cases *there cited. Lord Hardwick said, that a resulting trust [257 arising by operation of law existed: 1. When the estate was purchased in the name of one person, and the consideration came from another. 2. When a trust was declared as to part, and nothing said as to the residue, that residue remaining undisposed of remained in the heir at law; and he observed that he did not know of any other instances of a resulting trust, unless in cases of fraud. 4 Kent's Com. 300; 2 Atk. 71; 1 Johns. Ch. 582; 2 Johns. Ch. 405; 5 Johns. Ch. 1; 3 Lit. 399; 1 Cruise Dig. 311; Sug. Vend. 443.

To apply these authorities to the case in hearing, it is obvious that a resulting trust must arise, if at all, at the time the conveyance is made, and be certain. What is the state of things here? There is no pretense that those who seek to set up this trust ever paid any money. Instead of a resulting trust the bill seeks to make an estate for life to one with a remainder for another. The trust set up in the bill is uncertain, contingent, complicated, and difficult to enforce; one partly for the benefit of the grantee, and partly for the benefit of some of the other children, in unequal proportions. A slight variation in the testimony of the witnesses, introduced to prove the trust, might either give the estate to the two children who survived Mrs. Donahoe, or to such only as survived the father, or to all the heirs of the father. This case made shows almost anything else than a resulting trust. Indeed the bill itself rests the claim of complainants on the express declaration of the parties and their understanding at the time the deed was executed.

Does the bill, then, show a case of express trust, of a kind to let in proof, to sustain a decree for the complainant? If it does, it will be sufficient on the demurrer. We are of opinion it does. Proof may be introduced under the bill which might entitle the complainants to relief.

Another question arises on the case made. Can a trust in lands

be created by parol, and proven by parol under a conveyance *prima facie* absolute? It is conceded, as a general principle, that a deed or written contract can not be varied by parol. But is this a case of that kind? The object of the conveyance is not intended to be expressed in the deed. The grant and consideration is only 258] set forth. *No rule of the common law prohibited the creation of a trust by parol. No particular form of words were necessary to create a trust. It was only necessary to express the interest of the party creating the trust. Such a trust was not considered as varying the terms of the deed, but as setting up an independent contract consistent with it. The practice to go back of the deed to ascertain the real consideration paid is of every day's occurrence, and is familiar to all. Before the statutes of frauds and perjuries in England, unwritten contracts touching lands were enforced both at law and in equity. And after the passage of the law, contracts made before were enforced. 2 Showers, 17; 7 Johns. 434, 496; 2 Hayw. 131. The statute of frauds in Ohio was passed in February, 1810. The deed in this case was executed in 1808. At that time there was no law in Ohio prohibiting parol contracts concerning lands or the creation of trusts in them. It is true at no time could a legal estate in lands in Ohio pass by parol. The creation of a trust in an estate passed by deed, does not conflict with this position.

If we are correct in these views, the demurrer must be overruled.

The complainants requested us to look into evidence and decree on the merits, if the demurrer were overruled. We have done so. Cornelius Johnston heard both father and daughter say the deed was made to her because she was a cripple, and he wanted to place her above dependence and want during her life, and that at her death the property was to go to all the children except William. John Cummins heard both say the lot was deeded to Mary because she was a cripple, that she was to hold for life, and at her death it was to go to such of the children as were not provided for by the father in his lifetime. James Wilson heard the father say Mary was to have the lot for life because she was a cripple, and to prevent its being spent by the family. J. L. Wilson was called to write the old man's will, when the old man said he left Mary nothing because she was provided for, as she owned the lot. Henry Shane bought part of the lot, and the old gentleman

told him frequently and in the presence of the daughter, she was the sole owner, *and he bargained with her and paid her [259 for the part bought. James E. Miller heard the daughter say she held the lot for life, and at her death it was to go to certain heirs, not recollected. Mary Merrel heard her say that her father deeded to her because she was a cripple, and he wished to afford her a home during her life, not expecting she would ever marry; that she was to have it during her life, and at her death to go to the heirs. Jane Fleming says it was pretty much understood in the family that the lot was given to Mary because she would never marry or have children, and at her death it was to go to her brothers. Elizabeth Lanphear understood the deed was made to Mary because she was a cripple and she was to hold it for life. This is all the evidence tending to prove a trust or its extent. Which of these various declarations are we to take as true? They are all declarations made long after the deed, and shed little light on the real transaction. No certain trust can be deduced from it. It is probable the whole talk about the rights of any after the death of Mary Fleming rested on the expectation that she would remain single and die without issue, or having conveyed.

The bill is dismissed at complainants' costs.

JOSEPH POWELL *v.* ANDREW HARTER.

General issue and special pleas, verdict on the general issue only erroneous.

THIS was a writ of error, adjourned here from the county of Delaware. The original cause was *assumpsit*. They pleaded *non assumpsit*, and two special pleas of the statute of limitations, upon which issues were taken. The damages claimed in the declaration were eight hundred dollars. The jury found the first issue for the plaintiff, and assessed the damages to eight hundred and fifty-three dollars seventy-five cents. The verdict was silent as to the special pleas. Judgment, in the common pleas, upon the verdict, for the plaintiff, to reverse which the writ of error is brought.

260] *G. SWAN, for plaintiff in error.

PARISH, for defendant in error.

Judge HITCHCOCK delivered the opinion of the court:

Two errors are assigned in this case, to which the attention of the court has been turned:

1. That the jury did not find all the issues joined and submitted to their consideration, notwithstanding which the court rendered judgment upon the verdict.

2. That the damages demanded in the declaration are eight hundred dollars, and verdict and judgment for a greater sum, to wit: eight hundred and fifty-three dollars seventy-five cents.

The question arising under the first error assigned has been determined in the case of Hanly et al. v. Levin, and it is unnecessary again to consider it.

The judgment being for a greater sum than the damages demanded in the declaration is undoubtedly erroneous. If there were no other error in the case this court might, perhaps, after reversing the judgment, enter such judgment as the court of common pleas ought to have rendered. This would be done, however, only upon condition that the plaintiff below remits the excess in the verdict. It would be useless to do it in the present case, as the first error assigned is fatal, and that defect would not be cured.

The judgment must be reversed.

MIAMI EXPORTING COMPANY v. BANK OF THE UNITED STATES.

Interest on money. Rule for calculating it in a particular state of accounts.

THIS is a bill in chancery, to have an interest account between the parties, and was adjourned for decision from the county of Hamilton. The case is stated in the opinion of the court.

261] *N. WRIGHT and V. WORTHINGTON, for complainants.

CASWELL and STARR, for defendants.

Judge HITCHCOCK delivered the opinion of the court:

The only question which we are called upon to decide in this case, at the present time, is as to the mode of computing interest. From an examination of the books it is manifest that different modes of computation are adopted in the different states, and the rule generally adopted by a state is sometimes varied to meet the equity of a particular case.

It is a principle of law that interest shall not be compounded. It is somewhat difficult, however, I might say impossible, where payments are made at different times, to establish a mode of computation in which, if justice is done to both creditor and debtor, there will not be, to some extent, a compounding of interest. This consequence must be avoided as much as possible. The present case does not require of us to establish a general rule, and we refrain from doing it.

The facts of this case are simply these: On November 30, 1819, a liquidation of accounts took place between the plaintiffs and defendants, when a balance was found due, from the latter to the former, of three hundred and four thousand and fifty-four dollars forty-five cents, including forty thousand six hundred and nine dollars seventy-three cents interest. On October 4, 1820, plaintiffs proposed to pay this debt in eight annual installments, with interest on each installment as it should fall due; the interest to be computed from December 1, 1818, and the first payment on December 1, 1823. This proposition was agreed to, and eight notes were executed, each note, except the one which would fall due on December 1, 1830, for thirty-eight thousand dollars, and this latter for thirty-eight thousand and fifty-four dollars forty-seven cents. These notes are severally made payable on or before the first days of December, 1823, 1824, 1825, 1826, 1827, 1828, 1829, 1830, and all were on interest from December *1, 1819. Large payments [262 were made on these notes in 1821 and the year following; and the whole amount which had been paid was paid before the notes severally became due. On the part of the defendants, it is insisted that inasmuch as these notes were payable on or before a particular day, and payments were made before that day, they have the right to compute interest upon the principal sum up to the time of payment, add the two together, and deduct the payment, and so on, from time to time, as payments were made. Had the interest been due when the payments were made, this rule would

not be so objectionable, although we are not prepared to say it would be correct.

In support of the principle contended for, the defendants' counsel cite 8 Serg. & R. 378; Wash. C. C. 92; 17 Mass. 417; 1 Johns. Ch. 13; 2 Johns. Ch. 209, and a number of other cases. In all these cases I apprehend it will be found that none of the payments were made until after the debt was due; at least the contrary does not appear to have been the fact. The cases in Sergeant & Rawle, and the one in Washington, are upon judgments. In the case before the court no interest was demandable until the notes themselves became due. To adopt this rule, then, would be doing injustice to the plaintiffs. It would be charging them with interest before they could be called upon for either principal or interest.

To adopt what is called the commercial rule would be equally unjust to the defendants. There would not be the same injustice in this case, it is true, that there would be where the payments had been long delayed and the debt had been even due for a great length of time. In such case, it might so happen that the payment of interest alone would discharge both principal and interest. The case cited from 1 Dallas seems to recognize this principle. But it must be remembered, that the notes here were payable on or before a certain day. Although the defendants could not compel payment before the day, yet the plaintiffs might pay before that time and the defendants might be compelled to receive it. They could only be compelled to receive it upon the hypothesis that full payment was made, not only principal but interest. If, then, par-
263] tial payment only is *made, it would seem to be but just that this partial payment should apply as well to interest as principal.

We have found but one case reported similar to the one now before the court. This case is reported in 3 Cowen, 86. The court say: "Payments made on an installment not due and payable, should be applied to the extinguishment of principal and such proportion of interest as has accrued on the principal thus extinguished." For instance, a bond or note is given for the payment of one hundred dollars on or before the termination of one year. At the end of six months a payment of fifty-one dollars fifty cents is made. This is not applied to sink the principal to forty-eight dollars fifty cents, but the one dollar fifty cents is applied to the interest of fifty dollars for six months, and fifty dol-

lars to sink so much of the principal. At the end of the year there will be due fifty dollars of principal, and the interest on that fifty dollars for one year. This rule of computation is one which, we think, will do justice to the parties litigant in the case now before the court. The case will, therefore, be referred to a master to state an account upon this principle.

It is claimed, however, that the case in 3 Cowen is overruled by a case reported in the ninth volume of the same work. By reference to the case in 9 Cowen, it will be found that the decision reported was made by a circuit judge, and we do not readily perceive how such a case can be claimed as being of more force than a decision made by the Supreme Court of the state.

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*Wm. Greene v. Graham and others. [264

Land purchased with partnership funds and title taken to partners. One dies: Held, that the land was held as tenants in common, and the part of the deceased descended to his heirs, and, being sold under order of court, purchaser is entitled to partition.

This case was adjourned from the county of Hamilton. The case is stated in the opinion of the court.

Fox and Storer, for complainant.

Haines, for defendant.

By the Court:

This is a bill in chancery for a partition. The case made is this: Lot Pugh and his son were partners in trade, and purchased the lot in question with the partnership funds, and took a conveyance to the two. Pugh the elder having deceased intestate, his heirs at law released their interest to the son. The personal estate of Pugh the elder being found insufficient to pay the debts, application was made by his administrators to sell his undivided interest in the land in question, to raise a fund to pay the debts, under the statute of Ohio. On this application a sale

was made to the complainant, which has been confirmed and a deed made. He now seeks partition. It is objected that partition can not be ordered, because this property, being purchased by the partnership funds, is partnership property, and is not liable to the individual debts of Pugh the elder. We think these partners took this property as tenants in common, and that the interest of the elder Pugh descended at his death to his heirs at law, subject to the right of his administrators to dispose of it, under the law, to pay his debts. No objection is made to the regularity of the proceedings by the administrators, or the sale or conveyance to the complainant. He appears to us to have a legal estate. It is not with the defendants to avoid a partition by setting up a possible claim in the creditors of the copartners. We do not decide upon their claims, if they have any; but we leave them, if there are any, to assert their own rights.

The partition is ordered to be made by three commissioners, to report to the next term in Hamilton county.

265] *GRAHAM, FOR USE OF BARR AND LODWICK, v. BANK OF THE UNITED STATES.

Where party bids in property on sale or execution to protect a previous purchased title, third persons interested may consider the bid as money in the party's hands, and hold him accountable in an action for money had and received.

THIS cause was adjourned here from the county of Hamilton. It was an action for money had and received, in which a verdict was found for the plaintiff for six hundred ninety-one dollars forty-two cents, and the defendant moved for a new trial. The state of case was as follows: One Shipley recovered a judgment against Graham, in whose name this suit is brought, June 21, 1821, for three thousand six hundred and ninety-eight dollars seventy-seven cents. As collateral security for the payment of this judgment, Graham assigned to Shipley two judgments, one against one Snyder and another against one Schenck. In October, 1826, Shipley received on the judgment against Schenck one

thousand one hundred and eighty-eight dollars twenty-three cents. In October, 1828, he assigned to the Bank of the United States his judgment against Graham, and the two judgments held as collateral security, the bank being distinctly informed in what right and character Shipley held the judgments against Schenck and Snyder. Execution on Shipley's judgment against Graham had been levied on certain lots, which, after the purchase by the bank, were sold by the sheriff and bid off for the bank for three thousand one hundred and twenty-nine dollars forty-five cents, which sum the sheriff returned as made, and the court ordered a deed to the bank, which was executed by the sheriff. In September, 1829, the bank received one thousand seven hundred dollars on the judgment against Snyder, assigned by Shipley in the manner stated. The amount received by Shipley from Schenck, and the amount received by the bank from Snyder, with the amount bid for the property seized on Shipley's execution against Graham, exceeded the whole amount of Shipley's judgment six hundred and ninety-one dollars forty-two cents, for which the verdict was rendered, and to recover which the suit was brought, Barr and Lodwick having purchased from Graham the residuum in these claims remaining after Shipley's judgment was satisfied.

*In March, 1826, Graham and wife conveyed to the Bank [266 of the United States a great variety of real property under various stages of incumbrances, among the rest the property upon which Shipley's execution was levied in payment of debts due from Graham to the bank. Shipley's judgment, with the collateral security judgments, was purchased by the bank, to aid in protecting the title purchased from Graham. For that purpose the sale on Shipley's judgment was made, and the property bid in by the bank. No money was in fact paid to the sheriff, the bank being the only party interested, and the property sold having been previously purchased for the bank, subject to Shipley's execution. The question for decision was, whether upon this state of facts the plaintiff was entitled to recover.

V. Worthington and N. Wright, for plaintiffs.

Caswell and Starr, for defendants.

Judge WRIGHT delivered the opinion of the court:

It is urged in favor of a new trial that the three thousand one hundred and twenty-nine dollars forty-five cents ought not to have been considered as money in the defendant's hands, because no money was in fact received, nor was that sum the price of the real estate acquired by that sale; that the party acquired no title by the purchase, and the sale divested Graham of no interest, the object of the bank being to protect the title acquired from Graham by the deed in 1826 against the claims of others. If it were necessary to consider the question whether anything short of the actual receipt of money would sustain the action for money had and received, we should find little difficulty in deciding that that which was equivalent to money, or had been available to the party as such, would sustain the action. In our view of the case that question can not arise. If the plaintiff Graham had a right to a credit on the judgment against him for the amount bid by the bank, receipted for by it as money, and returned by the sheriff as so much made on the execution, then the six hundred and ninety-
267] one dollars forty-two *cents received in money from Schenck on the judgment in favor of Graham, beyond what was due the bank, is so much money actually received to the use of the plaintiff.

But it is said this credit ought not to be allowed Graham: 1. Because it was not available to the bank. 2. Because it only perfected the title to the land conveyed in the deed of 1826, and the party is estopped by that deed from setting up that claim.

Why was this not available to the bank? It was perfectly acquainted with the situation of the judgments and land when it took the deed and the assignments. The release gave to the bank the land subject to all the incumbrances. With full knowledge of its rights it availed itself of the execution for the purpose, as proved and even now claimed, of perfecting and disincumbering the title. It placed the incumbrance in the market, and in the competition of an auction, valued and bid it in at the price named. If any other person than the bank had bid in the land, no one would have questioned the right of Graham to the avails of it. Without applying to the court issuing the execution to set aside the sale for any reason whatever, the bank holds the deed as essential to its own title, and asks to be permitted to look back of its receipt and the return of the officer, and to consider the judgment

open, so as to enable it to collect of the collateral security nearly seven hundred dollars, more than sufficient to satisfy the judgment, and to hold it free from accountability! If the incumbrance had been a mortgage, would not the bank have been bound to satisfy it; and having done so, could it call upon Graham to refund? Neither will be pretended. Suppose the bank the trustee of Graham, and this suit a bill for an account, would not equity compel an account? Perhaps some other person actually bid on the property within one dollar of what the property was struck off at, and was only deterred from the purchase by the conviction of the determination of the bank to buy, and the utter hopelessness of the competition. There is no claim of mistake, or of misrepresentation by Graham to induce the purchase. The whole transaction originated with the bank for its own benefit. Conceding, then, to counsel that, in this action, the plaintiff only recovers what *in equity and good conscience he has a right to, it [268 seems to us he has such right to the verdict on the case made. Does the deed operate an estoppel? It contains no covenant of warranty, and even in a suit at law would not be construed to estop the party. But considering this suit as a bill in equity, how does it comport with the principles which govern courts of equity to set up an estoppel? The charge to the jury was the most favorable for the defendant. The jury were instructed to inquire if the purchase had availed to the bank the amount of the bid, and if not, to deduct the deficit from the sum received from Schenck. They have found that the bid availed the bank to the full value. If there was an error in this charge, it seems to us the bank can not complain of it. The charge is not, however, objected to. In our opinion the verdict not only accords with the law and evidence, but with the justice and equity of the case.

Motion for a new trial overruled.

JAMES McMILLEN v. STATE OF OHIO.

Indictment for having in possession counterfeit blank bank notes must specifically describe them.

THIS was a writ of error to the court of common pleas of Hamilton county, allowed on the 10th of December, and made returnable to the court in bank. The plaintiff in error has been convicted, with William Stephens, upon an indictment in these words: "That the said William Stephens and James McMillen on February 14, 1831, with force and arms, at the township of Delhi, in the county of Hamilton, did feloniously have in their possession two hundred counterfeit bank notes not filled up, and the signatures not being thereto affixed, which counterfeit bank notes were intended to be filled up with forged writing and signatures, in imitation of the true and genuine bank notes, of the president, directors, and company of the Bank of the United States, given for the payment of ten dollars each, the said W. Stephens and J. McMillen, then and there having said counterfeit 269] bank notes in their possession for *the purpose of disposing of the same with a fraudulent intent, contrary to the form of the statute," etc.

Error assigned, that the papers charged to be bank notes in blank, ought to be more specially described and set out in the indictment.

G. SWAN, for plaintiff in error.

By the COURT:

An indictment for forgery must describe the instrument alleged to be forged specifically. In an indictment for larceny it is enough to set forth that bank notes of a general description, to a specific amount in value, were stolen. It is not the specific character of the notes, but the theft, that constitutes the essence of the crime. In a prosecution for forgery it is different. The forged instrument must be set out, that the court may determine advisedly whether the fabrication of it constitute the crime inhibited by the law. All the precedents are so, and so are the authorities. 6 Term, 162; 1 East, 180; Arch. C. L. 19. The judgment must be reversed.

H. BITTLE, SUPERVISOR OF HIGHWAYS, v. JAMES HAY.

Where supervisor sues for penalty for obstructing road, there can be no judgment against him for costs; in such case, appeal lies from judgment of justice to the common pleas.

THIS cause came before the court upon a writ of error to the common pleas of Hamilton county.

The plaintiff in error, in his character of supervisor, brought a suit against the defendant for obstructing a highway. The justice gave judgment for the plaintiff for two dollars penalty and costs. The defendant appealed to the court of common pleas, where the appeal was sustained, and, upon trial, a verdict was found for the defendant, and judgment given that he recover of the plaintiff his costs. To reverse this judgment the writ of error was brought. The errors assigned were: 1. The general *error. 2. That [270 the court of common pleas had no jurisdiction. 3. That the suit was originally commenced before a justice of the peace, from whose judgment the law gave no appeal.

STORER and FOX, for plaintiff in error.

ESTE, for defendant.

By the COURT:

The law in force when these proceedings took place, indeed, it is not essentially different now, directs that the supervisor shall collect, by suit, all fines and forfeitures accruing for violations of the law regulating the opening of roads, unless the collection of the particular fine is otherwise provided for. The section under which the action is brought subjects the person who obstructs a public road to not less than two, nor more than ten dollars penalty, and authorizes a supervisor to sue for and recover the amount before any justice, unless some other person may have sued for and recovered the same. The judgment we are asked to reverse is for the defendant, and awards against the supervisor that he pay the costs. In respect to the costs, this is erroneous. Section 66 of the judiciary act of February 18, 1824, vol. xxii., provides for the case, and under it the judgment for costs must be reversed.

Upon full consideration, we think the appeal from the judgment of the justice to the common pleas was well taken by the defendant. The judgment of that court should have been for him, but without costs. It must be reversed as to costs, and affirmed as to the residue.

271] *HENRY ARNOLD v. JONATHAN FLATTERY.

What sufficient proof to sustain a road laid out and used for many years.

THIS cause was adjourned from the county of Fairfield. It was an action of trespass, in which a verdict was found for the defendant, and a new trial moved for, upon the ground of the admission of irrelevant testimony. The following state of facts was agreed by the parties:

The declaration in this case, lays the trespass to have been committed on the southwest quarter of section No. 1, township 15, range 19. The plea alleges that the defendant was a supervisor of a certain highway passing through and upon said tract of land, and that he entered upon the same, within and upon said highway, in the lawful discharge of his duty as supervisor, to repair said highway, and that he committed no unnecessary injury, etc. Replication: That there was not a public highway passing through and upon said tract of land, leading from Lancaster, in said Fairfield county, to Granville, in the county of Licking, as alleged in the plea, etc. Upon which the defendant took issue.

Upon the trial, the defendant offered in evidence, a book styled, "Records of Roads—Fairfield County;" admitted by the plaintiff to be the record book of roads for said county, containing the following entry:

"To the honorable commissioners of Fairfield county, now sitting in the town of Lancaster, June session, 1806: We, the persons appointed by order issued out at November session, 1805, to view and survey a road from Mount Vernon, on Owl creek, by Granville, on Licking, to Lancaster, do report that, in pursuance of the said order, we have viewed, surveyed, and do now return for public use, the same; the courses and distances are as follows, to wit: from the south end of Market street, in Mount Vernon, thence"

(here follow the several courses and distances to the termination of the road), "at the north end of Second street, in the town of Lancaster," to which are appended the following names: James Wells, Moses Powell, Robert McCleland, viewers; Thomas Cissna, surveyor.

*Then follows a draft or plat of a road from Mount Vernon, [272 on Owl creek, by Granville, on Licking, to Lancaster, and also the following entries:

"Recorded, May 21, 1816. Michael Garaghty, secretary to commissioners."

"These certify that the above draft is agreeable to the courses and distances expressed in the foregoing report. Thomas Cissna, surveyor."

The defendant further gave in evidence, by parol, that he was supervisor, etc.; that upward of twenty years ago, a road was laid out by the above-named viewers and surveyor, which road afterward was known by the name of the Granville road, leading from Lancaster to Granville; that the road so laid out passed along the western boundary of said quarter section, and partly on that adjoining.

After the record was read to the jury, and the parol testimony aforesaid was given, the plaintiff moved the court to overrule the admission of the record, unless accompanied with other documentary proof of the petition for the road, the appointment of the viewers, their report, and the proceedings of the commissioners confirming and establishing the road, etc. But the court allowed the evidence to go to the jury, with leave to the plaintiff to move for a new trial, in case the verdict should be against him; and instructed the jury that the record offered was of itself sufficient proof of the establishment of the road. Other evidence was offered by the plaintiff, tending to prove the trespass to have been committed on parts of the land different from that upon which the road was laid out, as proved by the parol evidence. But the court overruled the evidence, as being inadmissible under the issue.

It was also proved that the road laid out as aforesaid was subsequently opened and used; but that at or near the corner of said tract of land, the road as opened, instead of passing along the line of the land, as laid out, diverged, and passed angularly through it; that the road thus opened was used for a number of years, and improved as a public highway, during which time the land remained

unimproved; that subsequently the plaintiff entered upon the land and made an inclosure, including that part through which the road 273] *passed, as opened, at the same time opening a passage for public use along the line where the road was proved to have been laid out. Also, that the defendant afterward, as supervisor, entered upon the line of the road as first opened, and removed the fencing by which it had been shut up, which was the act of trespass for which the suit is brought.

H. STANBERY, for the new trial.

H. H. HUNTER, against it.

By the COURT:

Where a road has been laid out in the manner prescribed by law, opened and used many years, it can not be allowed that it shall be suddenly closed by any individual through whose land it passes, on the hypothesis that the road used does not exactly follow the courses and distances of the recorded survey. Nor can it be required, after the lapse of many years, that to sustain a public road every preliminary step directed to be taken in establishing it must be proven by existing papers or records. In this case the court admitted the record and parol proof of the opening and using the road. The record was admitted to establish the fact that the road had been applied for and ordered; the proof of the opening and use, to show where it was actually opened and used. We think that in this there was no error. A new trial must be refused.

A. BALDWIN *v.* WESTERN RESERVE BANK.

Where, after judgment against principal and sureties, the surety requests the creditor to give the principal time, he can not be relieved because time was given.

THIS cause was adjourned from the county of Trumbull. The case is stated in the opinion of the court.

VAN R. HUMPHREY, for complainant.

WHITTLESEY and NEWTON, and PEASE, for defendant.

*Judge LANE delivered the opinion of the court: [274

In 1818, Norton borrowed about eight hundred and fifty dollars from the Western Reserve Bank, for the payment of which he procured Baldwin and Wheaden his indorsers.

Judgment was recovered in 1819 against Norton and his indorsers, in three separate suits, executions for which were in the hands of the sheriff in February, 1820. These several executions were stayed by the agent for the plaintiff. On the 3d of May a conveyance of real estate was made to Perkins. On June 5, 1820, he executed a writing in the nature of a declaration of trust, in which it was agreed that if the title should prove good no further steps should be taken to enforce collection until the land should be sold and the avails applied in payment, and that no sale should be made if Norton should pay one thousand dollars per annum.

The arrangement made in this wise was calculated to embrace the security, not of this debt only, but of another debt of Norton of about three thousand dollars, on which Whittlesey and Remele were indorsers. If Norton should pay the one thousand dollars per annum, the share of that debt to which Baldwin and Wheaden were indorsers, which would be extinguished by it, would be about three hundred dollars per annum.

The matter rested in this situation until 1827, when the bank brought their *sci. fa.* to revive the judgment against Baldwin and Wheaden, Norton having died in the interim. To enjoin this and all further proceedings on the judgment, Baldwin and Wheaden have brought these separate suits in chancery, claiming a discharge from liability and the entry of satisfaction, because time has been given to the principal without their consent.

That time was given is not a matter of dispute. This suit was reserved under the impression that it presented the question whether, after the judgment against the surety, his relation, as surety, does not cease, and his claims upon the creditor, arising from such relation, are not extinguished.

But the question does not arise here. In February, 1820, while *the executions were in the sheriff's hands, a letter was writ- [275 ten by complainants to the bank, asking a stay of the execution.

against them, and using this language: "We would hope, at least, that Judge Norton might, with his property, pay what was mentioned or expected, viz: fifty dollars every sixty days, for one year, or to that amount; or whatever it might be, we wish he might do."

In our opinion this letter plainly shows a request by the sureties to pursue the property of Norton as far as it could be made available; that some arrangement had been contemplated between all concerned, by which Norton could pay three hundred dollars in one year, which these sureties desired to carry into execution. These terms necessarily imply a suspension of the existing process against the defendants, and the extension of credit to Norton for some of the debt for a period longer than a year.

These conditions seem to be met by the proceedings in May and June. All Norton's real estate was taken by the deed and appropriated toward the payment of his debts, and the present plaintiff's liabilities were provided for equally with Norton's other indorsers. The evidence leads us to believe that this was the arrangement into which the plaintiffs desired the defendants to enter; the suits, therefore, afford no reason to raise the question intended to be reserved in this case.

The bill, as framed, rests the claim for relief upon the position that the defendant gave time to the principal without consent of the sureties. In this aspect there is no case made for relief upon the facts; but as the facts show a trust fund created and an agreement that steps should not be taken to collect the debt until the trust fund was exhausted, we are content to retain the bill, to inquire into the condition of that fund, and appropriate it to satisfy the just claims of all the parties.

Judge HITCHCOCK, being a stockholder in the Western Reserve Bank, did not sit.

*PETATIAH BLISS v. DAVID LONG. [276

Bond, on appeal, must be for double the amount of debt and costs in the common pleas. Costs taxed against the appellant are not to be included.

THIS case was adjourned from the county of Cuyahoga. No arguments were submitted.

Judge WRIGHT delivered the opinion of the court:

During the trial of this cause, after part of the evidence had been given to the jury, the plaintiff, who was the appellee, discovered that the bond given on the appeal was not in double the amount of the judgment in the court of common pleas, and moved to quash the appeal. The court on the circuit have frequently decided that to perfect an appeal under our statute required a bond in at least double the amount of the judgment. Upon the authority of these decisions the court quashed the appeal, but gave the appellant leave to move to reinstate the cause, which motion being made was removed for decision here. The majority of the court are disinclined to disturb the construction which has been given to the act of the legislature regulating appeals. The penalty of this bond is not in double the amount of the judgment below for damages and costs. It is urged in support of the motion that the penalty of the bond is large enough to cover twice the amount of the damages and the costs properly taxed against the defendant, and a cost bill is presented, certified by the clerk of the common pleas, which shows the amount of the whole costs in the case. By this it appears that the sum of six dollars and five cents had been adjudged against the plaintiff at October term, 1828, before the final judgment, is included in the costs taxed against the defendant, and carried into the judgment. This is evidently a mistake of the clerk. If it be corrected, and that item is struck out of the judgment, the bond will be exactly double the amount of the remaining costs and damages, and the appeal will have been well taken. The difficulty is, that this court can not give to the certificate of the clerk validity to control or vary the record of the court below. The taxation of costs, however, *is the act of [277 the clerk, and follows the rendition of the judgment, though it is carried into the record, and forms part of it. We have no doubt

of the power of the court to revive these taxations of costs, and to order a retaxation when necessary to correct errors. This whole proceeding is posterior to the judgment, although it has relation to the judgment, and forms part of it. The appeal in this case will, therefore, be reinstated for the present, to afford the appellant the opportunity to apply to the court of common pleas to correct the taxation of costs in this case, and procure the evidence of the correction for this court; and if that shall be produced, the appeal will be reinstated.

This bill of costs presented here is one of the many evidences of a practice, in some parts of the state, to tax in the bill all the costs of the case on each side. The judgment is, that the party recovering shall *recover his costs expended*, etc. It is his recovery of the costs he is supposed to have paid out as they occurred, and which the judgment, in terms, restores to him. A majority of the court are of opinion that this mode of taxation is not warranted by law; that the clerks should keep the costs occasioned by each party distinct, and carry into the judgment only that occasioned by the party recovering the judgment.

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SAMPSON MASON *v.* THOMAS EMBREE.

Court will not hear cause without process and pleadings.

THIS cause was adjourned from the county of Clark. The case is stated in the opinion of the court.

No counsel on either side.

By the COURT:

This cause came before the court upon an agreed statement of facts. There are no previous pleadings, no bill, no process. In fact, the case is submitted to the court as arbitrators, to settle the rights of the parties.

278] *The first question is, whether the court will take jurisdiction in this way. The parties may waive process, and appear in court. But when once in court, an issue must be made up. We

are not willing to try a case unless there be such issue. We reverse judgments of the court of common pleas, where pleadings are waived; and consistency seems to require that we should not adopt a practice which we will not recognize in that court.

J. AND E. GREEN *v.* W. GREEN.

In issue of chancery to try the validity of a will, the defendant has the affirmative, but his answer is not to be read. Depositions taken may be read under circumstances.

THIS cause was adjourned from the county of Fairfield. It was an issue out of chancery, to try the validity of a will. The defendant, in chancery, moved the court to order that the affirmative of the issue might devolve upon him; that his answer, and the deposition in chancery, might be read on the trial.

SWAN and HUNTER, in support of the motion.

Judge HITCHCOCK delivered the opinion of the court:

Section 18 of the "act relating to wills and codicils," passed February 26, 1824 (22 State Laws, 1213), enacts, in substance, that any person interested may, within two years after probate had, by bill in chancery, contest the validity of any will; and that when the bill is filed, an issue shall be made up, whether the writing produced be the last will and testament of the testator or not. The statute itself having prescribed the issue, it must be followed.

The defendant, in chancery, has the affirmative of the issue to be tried. He affirms that the paper writing is the last will and testament of the testator. This fact is denied by the complainant. In the case before the court, an order must be made, so as to make the issue conform to that prescribed by the statute.

*The answer of the defendant can not be read by him on [279 the trial of the issue. In truth, no answer is necessary, for the law prescribed the mode of determining the litigation after bill

filed. The depositions which have been taken in chancery may be read on the trial of the issue, provided the deponents are not within the jurisdiction of the court at the time of trial. They will be subject, however, to every exception which might be made to them, if offered in chancery. The motion of the defendant is overruled as to reading of the answer, but sustained as to the depositions, with the foregoing restrictions.

The following is a copy of the order made in this cause:

"It being made to appear to the court that the complainant in this case seeks to set aside a certain paper writing, purporting to be the last will and testament of Timothy Green, late of the county of Fairfield, deceased, which has been admitted to probate according to the statute in such cases made and provided, it is ordered that an issue at law be made up between the parties, to try the validity of said will, and transmitted to the Supreme Court of said county, next to be holden therein, to ascertain, by the verdict of a jury, whether said writing is the last valid will and testament of the said Timothy Green or not; and that, in making the said issue, the respondents file a declaration affirming the said paper writing to be the last will and testament of the said Timothy Green. And the said complainant shall plead to the said declaration that the said paper writing is not the last will of the said Timothy Green, deceased. It is further ordered that either party may use, on the trial of said issue at law, any of the depositions properly taken, and now on file in this cause, which contain relevant and competent evidence, provided the witnesses, whose depositions are offered at the trial, are deceased, aged, infirm, or without the jurisdiction of the court, as depositions taken *de bene esse* are allowed to be read in cases at law. It is further ordered, that the motion of the respondent for leave to read his own answer in evidence be denied, and that this cause be continued."

*Samuel Kazer v. The State of Ohio. [280

Two persons indicted separately for the same arson, one convicted and judgment passed, the record is not admissible evidence against the other, when on trial.

This was a writ of error adjourned from the county of Delaware. The case is stated in the opinion of the court.

Parish, for plaintiff.

G. Swan, for defendant.

By the Court:

Kazer was indicted in Union county, for burning a store of J. & A. Admonson. Samuel Johnson was indicted for the same offense, at the same time, separately from Kazer. Johnson was tried, convicted, and sentenced to be imprisoned in the penitentiary. On motion of Kazer's counsel, the *venue* was changed to Delaware county, where he was afterward tried, convicted, and sentenced to be imprisoned in the penitentiary.

On the trial, the state introduced J. Admonson as a witness, who was asked by the prosecuting attorney, if he had seen the defendant in the store three weeks before it was burned, and what he saw and heard during that time. This question was objected to by the defendant's counsel. The objection was overruled, and the witness testified, that the defendant, about three weeks before the store was burnt, was in the store, and saw about fifty dollars in specie, in possession of the witness. The witness further stated that he had gotten from a negro named Samuel Johnson, who had been convicted and imprisoned in the penitentiary, for burning the store of J. & N. Admonson, a note for twenty dollars, payable to Samuel Johnson, purporting to be signed by the same Samuel Johnson, in the handwriting of the defendant. This testimony was objected to by the defendant's counsel, and admitted by the court.

After the prosecutor had given some evidence to the jury, of a concert between James Terry, Samuel Johnson, a negro, and the

defendant, in burning the store, the prosecutor offered in evidence 281] an exemplification of the record of the *conviction of Samuel Johnson for this offense, which was objected to, but received, and a bill of exceptions was signed by the court. The defendant was found guilty by the jury, sentenced by the court to ten years' imprisonment in the penitentiary, and judgment against him for costs. To reverse this judgment this writ of error was brought.

The court see no objection to the question put by the state to Admonson, whether the defendant was in the store three weeks before it was burned, and what he saw and heard there. The testimony given by Admonson, that Johnson, who had been convicted of this offense, had a note in his pocket, written by the defendant, is an immaterial fact, and from which neither the guilt nor innocence of the defendant could be inferred. The giving it in evidence by the state shows that the prosecutor had been unjustifiably anxious for the conviction of the defendent; that he was willing to have his guilt inferred from a circumstance that should form no part of the premises in coming to such a conclusion. A person in the penitentiary has a note in his pocket written by A.; therefore A. is guilty of aiding and assisting the prisoner in the commission of the offense of which he has been convicted. Nothing could be more illogical.

The plaintiff in error relies principally on the admission of the record of the conviction of Johnson.

In admitting this record, the court erred. The record of a conviction is evidence whenever the fact of the conviction becomes on trial material. It is the best evidence of that fact, as where the prosecutor makes the convict an important witness. Whenever he is offered to testify, the record of the conviction may be produced. In this cause, the conviction of Johnson was not material, although Johnson and the defendant had conspired to burn the store. Johnson might have been convicted, and the defendant be not guilty; or acquitted, and the defendant guilty. They might have agreed to burn the store, and the agreement be not consummated. The store, notwithstanding such conspiracy, might be burned by others. Johnson might have been convicted on insufficient testimony. The defendant was not confronted with 282] the witnesses who testified against Johnson; he had no *opportunity to cross-examine them. Can he, then, be bound by the inferences drawn by the jury in that case? A juror who tried

Johnson would have been rejected, lest he should be influenced by what he heard, and the opinion he then formed.

The rule, that the verdict and judgment, to be evidence, must be between the same parties, is the same in civil as in criminal cases, and for the same reason, that no person shall be bound by a judgment but him who has had an opportunity to be heard in the cause concluded by the judgment. 1 Starkie, 191.

A conviction or acquittal, on an indictment for an assault and battery, is not evidence for or against the defendant, on a trial of a civil suit for the same. 1 Starkie, 171. The parties are not the same; the evidence may not have been the same. It must be mutual; if the conviction would be evidence against the defendant, an acquittal would have been evidence for him. It is manifest an acquittal of Johnson could not have been evidence for the defendant.

Judgment reversed.

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*Methodist Episcopal Church of Cincinnati v. John Wood. [283

Member of a religious corporation, having no individual interest, is a competent witness where such corporation is a party.

Answer to a bill of discovery introduces new matter, not responsive to the bill, defendant can not read it on trial.

In suit by corporation, its legal organization can not be questioned, unless upon plea in abatement.

Conveyance for lands of religious incorporated society, made to individual trustees, instead of the corporation, the individual grantees are trustees for the society, and on sale receive the proceeds to its use.

The seceders from the Methodist Episcopal Church, who have organized a separate conference and reject the office of bishop, are not entitled to any portion of the property of the society from which they seceded.

Tried in Hamilton county, June, 1831, before Judges Hitchcock and Wright.

This was an action of assumpsit, commenced on August 17, 1829, for money had and received. Issue, *non assumpsit*. On the trial of the issue to the jury, the case made by the evidence was this: The members of the Methodist Episcopal Church of

Cincinnati had been incorporated under the "act for the incorporation of religious societies," passed February 5, 1819. See 17 Ohio L. 121. The corporation had purchased certain ground for a burying yard, which was deeded, on March 1, 1825, to the then trustees by name. This ground being intersected by the line of the canal, was rendered unsuitable for a burying yard, and was, by a resolution of the corporation, ordered to be sold, and new ground to be purchased for that purpose. The defendant was treasurer of the corporation, and as such, from time to time, received of the proceeds of said sale four thousand three hundred and twenty-three dollars and ninety-eight cents, and had, in like manner, paid out three thousand eight hundred and fourteen dollars and seventy-one cents, leaving a balance in his hands on March 7, 1829, of five hundred and nine dollars and twenty-seven cents, for which, with interest, the suit was brought.

On January 9, 1827, "the members of the Methodist Episcopal Church of Cincinnati, for the time being," were, by legislative act, created a body corporate, by the name of "the Methodist Episcopal Church of Cincinnati." Subsequent to this act of incorporation the defendant, still being treasurer, became dissatisfied with the government and discipline of the church, and, with a large number of other members, withdrew from the society, formed another society, with a different name, established rules for its government, built a church, and conducted worship as a distinct body of Christians. After the secession, at the annual election 284] on May 4, 1829, the remaining members of the *Protestant Episcopal Church elected a board of trustees from their own body, who, on May 7, 1829, appointed one Lawrence treasurer, in the room of the defendant, whose term of service had expired. The new treasurer, before suit brought, demanded of the defendant the money in his hands.

In the progress of the trial, O. M. Spencer, Esq., a member of the Protestant Episcopal Church was called as a witness for the plaintiff. The counsel for the defendant objected to his admission as incompetent, on account of his interest as a member of the corporation.

By the COURT:

The competency of the witness depends upon the answer to the question whether he has, at this time, an actual subsisting inter-

est in the event of the suit; and whether the verdict to be rendered in this case can hereafter be used by the witness in support of any claim of his own? The interest, to disqualify a witness, must be *certain;* one merely contingent or expectant affects only the credit. That the witness offered is a member of a charitable or pious corporation does not, of itself, render him incompetent to testify in a suit brought by such corporation. If this witness, as an individual, is to gain or lose by the event of this suit, the party objecting to his evidence must prove that fact. In cases where corporations of a *public nature*, comprehending the divisions of the state, or institutions for charitable or pious purposes, such as counties, towns, school districts, religious or charitable societies, are parties to the record, or interested, the members of the corporation, having no individual interest, are competent witnesses. But where corporations of a *private nature*, instituted for special purposes and private emoluments, such as banks, insurance, turnpike, and canal companies, bring suit, the interest of the corporators is direct, and they are incompetent to testify in support of their claim. Phil. Ev. 36-57; 3 Johns. Cas. 83; 9 Johns. 222; 1 Day, 35, 270; 7 Mass. 398; Swift's Ev. 57.

The plaintiffs having read in evidence to the jury certain *parts of the answer of the defendant to a bill of discovery [285 filed in chancery against him in aid of this suit, the defendant's counsel now offered to read in evidence the residue of the answer and the bill. This was objected to by the plaintiff's counsel.

By the COURT:

The bill, if it contain any facts useful to the defendant, is evidence for him against the plaintiff. The answer of the defendant is evidence for him, so far as it is responsive to the call in the bill for discovery, or connected necessarily with the responsive matter, or explanatory of it. So far as the answer in such a case sets up matter not responsive to the call of the bill, or is not necessarily connected with, or explanatory of it, it can not be used in evidence by the party making it.

STARR and HAMMOND, for the defendant, in summing up, made the following points:

1. That the plaintiffs have not shown a compliance on their part, with the provisions of the act incorporating religious societies,

without which they have no corporate rights, and can not maintain this action.

2. That the deed for the ground, from the sale of which the money in question was received, conveyed the title to the individual grantees only, and so vested no interest in this corporation for the proceeds.

3. That the money in question belonged to the defendant and the other individuals of the church, jointly, and so the defendant is not liable at law.

4. That the defendant, and his associates, who separated from the Methodist Episcopal Church, retain their corporate powers, and as such, have a right to retain this money.

N. WRIGHT and LEWIS, contra.

286] *Judge WRIGHT charged the jury:

If the defendant intended to object the want of capacity in the plaintiffs to sue, he should have pleaded that matter specially, in abatement or bar. He has pleaded the general issue. This admits the capacity of the plaintiffs to sue in the corporate character they have described for themselves. 1 Peters, 386, 450; 4 Peters, 591; 1 Bos. & Pul. 40; 1 Mass. 482, 484; 1 Saund. 340, n. 2.

The ground assumed by the defendant, in the second proposition, must be sustained, if at all, upon strict law; in this equitable action, it is entitled to no favor. The defendant was one of the trustees of the church, managing its concerns under the corporate powers acquired, or supposed to be acquired under the act of 1819, incorporating religious societies. 17 Ohio L. 120. The purchase was made by order of the trustees, with the means of the society. By the same authority it was sold, and the defendant received the money on the authority of an appointment emanating from the same source. The corporation had new powers imparted to it under the act of February 9, 1827 (25 Local Laws, 85), in which the defendant was one of the trustees. For more than two years after the taking effect of this act, the defendant continued, under its authority, to receive and pay moneys for the corporation, as such. Having become dissatisfied with the government of the church, he seceded, and now seeks to retain the funds which came into his hands under the authority; not upon the ground of error in himself and his co-trustees, in taking the con-

veyance of the ground bought with the corporate means, to themselves, individually, instead of the corporation! The question, here, is not one of legal title to the land, but to the money raised by the sale of it; and the simple inquiry, under the issue, is, whether the defendant, upon the facts disclosed, and the legal assumption taken in his behalf, has a right, in equity and good conscience, to retain the money received by him against the very authority under, and by virtue of which, it came to his hands? We think he has not. But if the question did touch the legal right to the land, we are not prepared to say the *law would sustain [*287 the defendant's claim. The "act securing to religious societies a perpetuity of title to lands and tenements, conveyed in trust for meeting houses, burying grounds, or residence for preachers," passed on January 3, 1825 (23 Ohio L. 9), provides that such land, not exceeding twenty acres, that *had been*, or thereafter *might be*, conveyed to any person or persons, in trust for the use of any religious society, should descend, in perpetual succession, to such trustees as should from time to time be appointed by any such religious society, according to its rules, etc. This act was intended to remove all difficulty arising from defective conveyances, and seems to us amply sufficient to effect the object, whether the trust be secret and implied, or expressed in the conveyance. The case in hearing is, we think embraced within its provisions.

It is urged, further, that even if this property were held by the corporation existing before the act of January 9, 1827, no power is given by that act to the present plaintiffs to sue. That act incorporated "the members of the Methodist Episcopal Church of Cincinnati, for the time being." Section 4 (25 Local Laws, 86) provides, "that all estate, *real* and *personal*, now holden and possessed" by the church, be *vested* in the corporation thereby provided, and empowers the trustees to dispose of it, and to receive the proceeds for the benefit of the corporation. We are not able to discover any defect of authority in the plaintiffs under the act.

If this reasoning be correct, it seems fatal to the third objection raised in this defense; because, if this property belonged to the corporation, as such, the individual interest of the defendant or his associates, joint or several, is at an end. The whole interest they have is as corporators, not as individuals. No reasoning will be required of us to prove that an individual corporator may

be made liable at law, to the corporation of which he is a member, in the same way that any other individual would be.

The fourth and last objection of the defendant presents the inquiry, whether the members of the church, including the defendant, after their secession, retained the corporate powers of the 288] church from which they seceded? This assumption *would have rested on more plausible ground if the case made had shown the defendant and his associates, after the separation, holding themselves out as the Methodist Episcopal Church, and exercising under such claim the corporate powers of that church. The conceded points show an entire different state of things. The efforts of the dissatisfied members are not directed, within the church, to effect a reformation in its government and discipline, according to the usage of the society, to conform it to their wishes. They moved off in a body of several hundred, and associated themselves, not as *the* Methodist Episcopal Church, but, as is now claimed for them in argument, a persecuted body, forced from the church by the intolerable tyranny of its government. The body of persons, thus separated, agreed upon articles of association, differing essentially from the rules governing the Methodist Episcopal Church. By these articles of association they have since conducted their affairs, and conducted worship as a distinct church, denying all accountability, alike in the spiritual and corporate power of the Methodist Episcopal Church.

In this state of facts it is difficult to perceive the ground on which the claim is now advanced, that they remain the Methodist Episcopal Church. Those remainiug in that church have continued to exercise the corporate functions in conformity with the provisions of the act of incorporution; and against a body who have acted openly upon other principles, and continued so to do until this time, they must be held, in this action, the corporation. The office of treasurer, held by the defendant under the corporation, has expired, and another has been elected to the place, to whom he refused to pay over the money received as treasurer. It is not shown, or pretended even, that the defendant was treasurer when the suit was brought, appointed in any way whatever. We can discern no legal right in him to retain this money.

There was a verdict for the plaintiffs, and judgment, by consent of parties, for the amount, without costs.

CASES

DECIDED BY THE

Supreme Court of Ohio,

BEFORE ALL THE JUDGES,

5 293
19 568

AT A SPECIAL SESSION HOLDEN IN COLUMBUS, DEC., 1832.

ATKINSON AND ROLLINS *v.* JORDAN, ELLIS & CO. AND OTHERS.

An assignment of effects, by an insolvent debtor, to trustees, for the benefit of preferred creditors, with a clause that those who do not, within a time specified, release the debtor for account of what may be received, from the proceeds of the assignment, is void as against other creditors. The effects assigned, may, by proper process, be subjected, in the hands of the assignees.

IN chancery, reserved from Hamilton county.

The complainants are creditors of Jordan, Ellis & Co. They have prosecuted their claim at law, recovered judgment, and taken out execution, but are unable to find property to satisfy their claim. Jordan, Ellis & Co., the debtors, being compelled to stop payment, executed an assignment of all their property to the defendants, Ames, Fessenden, and Bates, in trust for the benefit of their creditors, with authority to sell and apply the proceeds: 1. To defray the expenses of the trust; 2. To pay certain lawyers' fees; 3. To indemnify certain securities in a suit at law; 4. To pay certain pre-

ferred creditors; and, 5. To apply the residue, if any, to satisfy the claims of other creditors. The assignment contains, among others, the following clause: "Provided, nevertheless, and these presents are to be understood with this provision, that n one of the creditors herein mentioned, of either class, shall be entitled to the benefit of this assignment, or to claim any payment of their debts or demands, by virtue hereof, excepting such as shall, within ninety days from the date hereof, signify their assent to this assignment, and release the parties of the first part (Jordan, Ellis & Co.) by signing and sealing these presents." The assignment 294] *contained, in a separate clause, *a release by each signor of all claims and causes of action against* J., E. & Co. The complainants are in the schedule of creditors annexed to the assignment, but have not executed it. Jordan, Ellis & Co. affirm that the assignment was made in good faith. The trustees admit the assignment, but allege that, when this suit was commenced, they had received nothing as proceeds of the assignment. The *estimated* amount of property which passed under the assignment is nineteen thousand two hundred and six dollars and twenty-two cents. The schedule of preferred debts is set down at thirty-one thousand three hundred and forty-four dollars and seven cents, that of other debts, at twenty-four thousand six hundred and four dollars and sixty-eight cents. The complainants call upon the defendants to disclose the trust property and proceeds, and pray that these effects and funds may be held liable to satisfy their judgments, and for general relief.

STORER & FOX, for complainants, cited 5 Johns. Ch. 332; 14 Johns. 458; 20 Johns. 446; 6 Conn. 277; 4 Mason, 206.

STARR, contra, cited 8 Pick. 113; 7 Pick. 74; 9 Pick. 21; 2 Kent Com. 420; 2 Pick. 129; 5 Mass. 144; 5 Conn. 647; 14 Johns. 459; 5 Johns. Ch. 329; 15 Johns. 511; 13 Mass. 146; 20 Johns. 142; 1 Hopk. Ch. 373; 4 Dal. 76; 22 S. & R. 198; 2 Bin. 174; 5 Greenl. 252; 4 Mason, 206.

Judge WRIGHT delivered the opinion of the court:

It is claimed that the assigment of Jordan, Ellis & Co. is fraudulent and void. The only objection urged, is to the clause which declares it inoperative in favor of any creditor who should not,

within ninety days, execute the same and release the debtor. The case is without any evidence of fraud in fact, and presents a question of fraud in law, to be established by the force of the instrument.

It is said the genius of the common law opposes itself to every species of fraud; and the most solemn acts, even judicial proceedings, if tinctured with it, are held to be vicious and unavailing. While the multiplied and ever-varying relations of society refine the arts of deceit, and the intricacy of legal transfers and proceedings multiply the means of fraud and increase the difficulty of tracing and fixing the fraudulent connection between the original act and the ultimate *purpose, they invoke the greatest vig- [295 ilance of the law in scrutinizing colorable and equivocal transactions, and require of courts, in deciding upon them, to have some regard to public utility. It seems admitted that a debtor, in failing circumstances, may, in good faith, pay one creditor in money or goods, in preference to another; but the frequent abuses practiced, in transfers, to effect a preference by means of trusts, instead of actual payment, has led many to doubt the policy of holding such transfers valid. As a general proposition, it will not be denied that persons so situated are legally bound to good faith between themselves and their preferred creditors, and moreover to avoid, in transactions connected with the placing their effects beyond the reach of legal process, all bad faith in respect of other persons standing in a relation to be affected by them. The practice among speculating traders, of shattered and desperate circumstances, of accumulating property upon credit with a desire of securing the means of satisfying the claims of confidential creditors, who contribute in various ways to keep up the credit upon which the property has been procured, and then passing their effects, so procured, into the hands of trustees to be protected from legal process, and to be exhausted in satisfying those preferred claims, leaving all other creditors without a farthing, can hardly be justified on any sound moral or legal principle. Instances are frequent of merchandise, procured from an honest trader on credit, being handed over in bulk to trustees to secure indorsers and other confidential creditors. Equity delights in equality, and it is becoming a grave question, whether courts of justice should longer countenance a sinking debtor, in preferring one creditor to another in the distribution of his effects. The opinion is gaining

ground, that chancery should control such assignment, and compel an equal distribution of the effects assigned among all the creditors.

In Burd *v.* Smith, 4 Dal. 76, the high court of appeals in Pennsylvania held an assignment void, which provided for the distribution of the assigned effects to such creditors as should agree to accept, and the payment of the proportions of such creditors as should not accept to the debtor, because it contained a resulting 296] trust to the debtor and placed *the dissenting creditors in his power, or that of trustees appointed by him. The judges in that case delivered their opinions *seriatim*. Smith, J., held the deed void on its face. Breckenridge, J., page 88, says the right of a debtor to favor particular creditors "has been allowed, perhaps, on principles of humanity; or in favor of just debts, to exclude debts in law not strictly *ex debito justitiæ*. But I do not think the practice should be encouraged. It is calculated to create confusion, uncertainty, and collision. I see nothing that will prevent the mischiefs of voluntary settlements and conveyances, but a general declaration that they are all void as against creditors." Rush, J., page 89, says, "Until the expiration of nine months no distribution is to be made nor any creditor paid, however vigilant he may be. If a creditor may, in this mode, or by a device of this sort, frustrate his creditors for months, where shall the line be drawn? Why not delay his suit for nine years as well as for nine months? His rights are the same in *both* cases. As there is no law of the land that authorizes a debtor to pass an act of limitation in his own favor, I hope this court will never do it for him." "In the case before the court, we have an instance of a man plunged into debt, covered with lawsuits, overwhelmed with judgments, and others impending over his head, suddenly and secretly, without the knowledge of a single creditor, conveying to trustees of his nomination an immense property, on such terms and in such manner as he has chosen to prescribe. I can not conceive anything more dangerous than to sanction, by judicial determination, a deed of this description. It will be vesting the debtor with an unlimited power at all times over his property, to baffle his creditors, under the specious pretext of paying them. A decision of this sort is warranted by no adjudged case in the books."

The Supreme Court of the same state, in Lippincott *v.* Barker, 2 Bin. 182, sustained an assignment conditioned that it should ben-

efit only such creditors as should execute a release in four months. But Chief Justice Tilghman, page 182, says, "I beg, however, to be distinctly understood, that my opinion is confined to the circumstances of the *present* case, for there are *many and strong* objections to deeds of assignment, made without the privity of creditors, and *excluding all who do not execute releases." Judge Breck- [297 enridge, page 190, in giving his opinion, says: "It has been left to the *astutia Americana* of debtors, to devise such a warehousing of effects, out of the hands of the law for a time, for the benefit of particular creditors. I think it to the let and hindrance of creditors, and that such disposition is void both at common law and by statute; though not fraudulent in fact, in the particular case, yet fraudulent in law, and therefore void. It is not simply a surrender of his property as satisfaction *pro rata* of his debts that the insolvent has in view. He couples an interest for himself in obtaining a discharge from that proportion of the respective debts which may remain unsatisfied. It is taking an undue advantage of the situation of the creditor to impose this condition. It is immoral to exact it. *Volenti non fit injuria* if the creditor accepts, but it is making a volunteer by compulsion, and is in fact a robbery. One enlightened on the principles of moral honesty would never think of it. He would give what he had to one or more, or to the whole of his creditors, but he would never think of annexing a condition precedent or subsequent to such surrender. Of such conditions, a chancellor would not compel a fulfillment. I can think of nothing either morally honest, or strictly legal, but the indefinite, unconditional surrender of the property. Pass this boundary, and I can draw no line where an assignment shall be supported and where not. Every case must be *ad arbitrium judicis* without principle to guide; and he must decide according to his own feelings of what is just and humane, or hard and uncharitable, in the case."

In Passmore *v.* Eldridge, 12 S. & R. 198, the court held that an assignment would be void, if the transaction, taken altogether, has a direct tendency to protect the property of the debtor from his other creditors. The cases of Chever *v.* Clark, 7 S. & R. 570; Scott *v.* Morris, 9 S. & R. 123, and Wilson *v.* Kneppley, 10 S. & R. 439, seem to admit the debtor's right indirectly to coerce his creditors, by a conditional assignment, prohibiting them from participating in his effects unless they executed releases within a *reasonable* time.

And in Pierpont & Lord *v.* Graham, 4 Wash. C. C. 232, Judge Wash-
298] ington held, that a condition to an assignment *requiring creditors to execute a release before taking the benefit of it, was not *per se* evidence of fraud, and that such disposition of property by the debtor would be valid, if it was not thereby to be sheltered from creditors an indefinite and unreasonable time.

In Widgery *v.* Haskell, 5 Mass. 144, a debtor transferred all his property to trustees, the proceeds to be applied to pay indorsers and securities in full, and the remainder to be distributed to such other creditors as gave notice in six months, stayed all legal process, consented to have their claims adjusted by the majority, and released the debtor on the admission of their demands. This was held void, though the decision did not turn on the condition for a release. Chief Justice Parsons, in giving the decision, remarks: "Was this conveyance *bona fide?* Was it made with honest intentions, etc., and for purposes for which the law will authorize an insolvent debtor to convey all his effects? It purports to be made for the benefit of the indorsers and securities of the grantors, and for the grantees to secure them. But it is evident the intent of the parties went much farther; to compel the discharge of the grantors from all their debts, by locking up from every creditor who would not discharge them every part of the estate of the grantors." "Does the law allow an insolvent debtor to make this bankrupt law for himself? By our law a debtor's property is liable to attachment by any creditor; and, on the other hand, a debtor may prefer one creditor to another, by paying his debt either in cash, or by conveying so much of his estate as will be adequate to the payment. But the creditor must be a party assenting to this payment or conveyance. If he be not, nothing passes to him, and nothing passes from the debtor, and his estate intended to be conveyed remains liable to attachment by any other creditor." Again, he says, "We do not admit that an insolvent debtor can convey his estate in trust to pay his creditors without their consent." "The intent of the parties, apparent from the deed, was not the true intent, which was the *pro rata* payment of the other creditors on their discharging the grantors; the deed, therefore, was on a confidence not expressed, for their own benefit, reposed by the
299] grantors in the grantees. We say for the benefit of *the grantors, because they expected, in this manner, to obtain a discharge from the debts, on paying a part of them."

In Ingraham *v.* Geyer, 13 Mass. 146, the court held an assignment void conditioned for such creditors as should within four months release all their claims against the assignor, although that was not the sole ground of the decision. Parker, Chief Justice, says, "It is voluntary on the part of the debtor and involuntary on the part of the creditor. It has no legal consideration; for the debts of the creditors who are to become parties are not discharged at the time, and it shuts out from a participation in the funds all the creditors who will not give an absolute discharge from all their debts. There is, indeed, but one party to the indenture, viz: the assignor, for the persons named are his agents until the creditors sign the instrument. Such an assignment can not be supported."

In Burlingame *v.* Bell, 16 Mass. 324, the court held that a fraudulent assignment created no lien in favor of the assignee and says, "the man who fraudulently receives the property of another to prevent its being attached, ought not to have the right against the will of the creditors whom it is attempted to defraud, to have the opportunity to perfect the fraud, by disposing of the goods, and leaving the creditors his liability only for his security."

In Harris *v.* Sumner, 2 Pick. 129, the court held that an insolvent debtor could not transfer his whole property in such a manner as to make provision for himself, and to lock it up from those of his creditors, who did not feel willing to accept of the remainder and discharge him.

In Borden *v.* Sumner, 5 Pick. 265, an assignment conditioned for a release by agreeing creditors was fully discussed by counsel, though the decision turned upon different grounds; but in page 267, the court express the opinion that the point has never been decided in that state.

In Johnson *v.* Whitwell, 7 Pick., Judge Wild says, "An arrangement to secure property from attachment for the time being, though ultimately to secure the rights of all the creditors, is against the policy of the law—an attempt to hinder creditors in the prosecution of their lawful actions. Such attempts to cover the property from legal process, are unlawful, *and although [300 no moral fraud was intended, yet it was a legal fraud, and can not be set up against a creditor."

In the cases of Marston *v.* Coburn, 17 Mass. 454; Andrews *v.* Ludlow, 5 Pick. 28; Lupton *v.* Cutter, 8 Pick. 298; Cox *v.* Adams,

5 Greenl. 245; DeCaters v. LeRoy Chaumont, 2 Pick. 491; and Canal Bank v. Cox, 6 Greenl. 395, assignments with conditions for a release by assenting creditors were investigated, and held valid, though no objection was made on account of that clause.

The case of Halsey v. Whitney, 4 Mason, 206, has been confidently cited as conclusive upon the point in controversy. In that case the court did hold an assignment with the condition of a release valid; but the judge places his decision upon what he took to be the practice in Massachusetts. In page 230, he says, "When we take into view the great length of time during which stipulations of this nature have prevailed in this state *without objection*, there is much reason to believe that the profession have deemed the law settled in favor of the debtor on this point. But I am free to say, that if the question were entirely new, and many estates had not passed upon the faith of such assignment, the strong inclination of my mind would be against the validity of them."

The decisions in New York, although not direct upon the naked point presented in the case in hearing, tend strongly to convince us how the rule of law is esteemed in that state. Chancellor Kent, in Leavring v. Brinckerhoof, 5 Johns. Ch. 332, held a partial assignment, upon condition of a release by creditors, as of pernicious tendency, if not fraudulent. He says, "a power of coercion over the creditor with such resulting trusts to the grantor, in case the coercion should not be successful, was deemed by the Supreme Court, in Hyslop v. Clark, 14 Johns. 458, to be a badge of fraud and not a fair and lawful assignment." The assignment in the case of Hyslop and Clark was to a trustee, for such creditors as should release, and in case any refused to release, their proportions to be paid to such other creditors as the assignors should appoint, and the overplus to the assignors. Judge Van Ness, in giving the opinion of the court, expressed his conviction that the assignment was, in judgment of law, fraudulent and void. "One object (he 301] said) evidently was to coerce the *creditors to acquiesce in the terms offered to them. The language held to them is this: 'If you will release your debts, you may participate in the benefits that may result from this assignment, but if you refuse, we will lock up our property indefinitely, in such a way that whether you ever get any part of it shall depend upon our will and pleasure.'" Again, he says, "if they can keep it (the property) locked

up, in this way, in the hands of trustees, and set their creditors at defiance for three months, they may do it for three years, or an indefinite period. I think, therefore, that this part of the assignment is void under the statute of frauds; and that it would be establishing the most dangerous precedent, to declare it to be valid."

In Austin *v.* Bell, 20 Johns. 442, an assignment conditioned for a release by assenting creditors, and for the reservation of the shares of those refusing to release to the grantor, was held void, and the assigned property held subject to levy on execution, Chief Justice Spencer, in giving the opinion of the court in that case says, page 150: "This is not only an attempt to coerce creditors, and to place the property beyond their reach on execution, but it is the reservation of property which ought to be devoted to the payment of their debts to their private use. Without in the least impugning the doctrine that a man indebted has a right to give preference to creditors, I am bound to say that a deed which does not fairly devote the property of a person overwhelmed with debt, to the payment of his creditors, but reserves a portion of it to himself, unless the creditors assent to such terms as he shall subscribe, is, in law, fraudulent and void, as against the statute of frauds, being made with intent to delay, hinder, or defraud creditors of their just and legal actions."

In Mackie *v.* Cairns, 1 Hopk. Ch. 404, Chancellor Sanford says that when a debtor "transfers his property upon the condition that his creditors, who are pursuing their legal remedies, shall relinquish their remedies, such a transfer is plainly made to coerce the pursuing creditors; it directly impedes the course of law and justice, and it must be void." Again, page 406, he says: "Where such assignments are made merely for the payment of debts, they are often convenient to creditors as well as debtors, and they seem to involve no great evil. But *when the debtor [302 is allowed to proceed beyond the single object of paying his debts, such assignments become pregnant with great mischiefs." "If he may assign all his property, in trust, partly for himself and partly for his creditors, and may allot to some of his creditors absolute payment, and to others payment upon condition that they shall do or not do acts dictated by himself, he is, indeed, armed with a formidable power. If a debtor may, by any machinery of his own contrivance, either reserve his property for his own use, or wield it

in such a manner that his creditors can not reach it in due course of law, or can not reach it without great difficulty, he becomes the master, and holds the power of coercion." In page 407, he says: "It is only against the property of a debtor that our laws have any efficacy, and the laws concerning conveyances, made in fraud of creditors, are now the only efficient check upon the power of disposition in the creditor. While assignments for the payment of debts must be supported, I can not perceive that either law, equity, or policy, requires that such assignments should be sustained where they are complicated with trusts and followed by consequences so injurious and vexatious to creditors. Assignments containing the provisions which appear in this case are of recent invention, and if they can prevail, they will, to a great extent, afford to debtors a secure triumph over their creditors." Chief Justice Savage, in the same case, 5 Cowen, 580, esteems it a conceded point that a man can not put his property beyond the reach of his creditors, and he says: "When a debtor fails from misfortune or folly, or from dishonest motives, his property in moral justice belongs to his creditors. When he appropriates his property to his own use the act becomes fraudulent, *nor does it lie in his mouth to prescribe terms to his creditors.* The law is open to them. They have a right to pursue their debtor in the mode pointed out by law, and *any act which obstructs them in their pursuits is against law, and, of course, void,*" as against creditors.

I have examined the foregoing cases, because it seemed to be assumed that our decision, if against the validity of the assignment, would contravene the authorities. It is somewhat remarkable 303] that amidst all the strong language used *on the subject, so little upon the simple question under consideration is embraced within the *decisions.* The case of Ingraham *v.* Wheeler, 6 Conn. 277, is full in point upon the case in hearing. There the assignment was to pay certain preferred creditors, and the residue to such others as should, within six months, execute a discharge, and the court held it void. In page 283, Judge Brainard says: "No insolvent debtor has a right to prescribe terms to his creditors; 'to say to them take up with the crumbs on my own terms or have nothing.' Besides, if their creditors do not see fit to comply with their terms, where is the residue? The answer must be, in the hands of the trustees of the bankrupt's own creation, and for his own use and benefit, a trust necessarily resulting. I, there-

fore, lay this instrument totally out of the question as being wholly void, and that upon the face of it."

The District Court of the United States in Maine, in Lord v. Brig Watchman, in April, 1832 (see Amer. Jurist, Oct. No., p. 296), has fully examined this subject. This court holds "that a transfer by a debtor of his property, which, in its effect, would delay the creditor's remedy against the estate for an indefinite period, unless they would consent to take a less sum than their whole debt in satisfaction, or consent to discharge the debtor, on different terms from those borne on their contracts, is a conveyance made to delay and to defraud creditors. The object of such a conveyance is to coerce the creditor to discharge the debtor from his contract without his fulfilling his obligations." "No argument is required to prove such an intent illegal."

It seems to us clear, upon authority and the reason of the thing, that the clause in the assignment of J., E. & Co., prohibiting any creditor from availing himself of any portion, except within ninety days he executed a release for his whole debt, is a manifest attempt, on the part of these debtors, to place all their property beyond the reach of creditors, by ordinary legal process, and coerce from them a release of their entire demands upon the possible contingency of realizing something out of the effects, after the expenses, securities, and preferred creditors are satisfied, and as such is void against creditors. The case before the court is a *strong [304 one to show the injustice of such proceedings. The debtors, the trustees, and only three or four of a large number of creditors have executed the assignment, while, by its operation, property to the amount of nineteen thousand dollars, is held under it beyond the reach of legal process. An effort is made by it to procure releases from the general creditors, without the possibility of their obtaining one cent. The preferred creditors alone, who are postponed till the expenses, securities, and fees are paid, have claims upon this nineteen thousand dollars for upward of thirty thousand dollars? Can this be considered as fairly devoting the property of insolvent debtors to the payment of their debts?

Our statute of frauds makes void all assignments of goods in trust for the use of the assignor, and all conveyances of every kind made with intent to defraud creditors of their debts. 29 Ohio L. 118. The variations between the provisions of this and the English statutes are not deemed material, in any view of the subject

before the court. The principle is, that a failing debtor shall neither make assignments of his effects for his own benefit, nor lock them up beyond the reach of legal process, unless without consideration he obtains a release of all his debts. No slight variation in the terms of the assignment will affect the principle, when the design is evident to defeat a creditor of his resort to the goods, or compel him to release.

The case must be sent to a master to report the extent of the effects which passed into the hands of the assignees, and their present situation, and the amount of the proceeds, if disposed of.

305] *Charles C. Perry v. The Ohio Insurance Company.

An insurance of the body, machinery, tackle, and furniture of a steamboat covers the cost of repairing any injury to either within the policy, and the expense of towing her to the nearest port for repairs; but does not cover the wages and subsistence of the hands during the delay.

Covenant upon a policy of insurance, reserved from Hamilton. The policy was for four thousand dollars, "on the entire of the steamboat Belle Creole, including her machinery, furniture, etc., for four months, etc., with the privilege of navigating the Mississippi and Ohio rivers, with such of the tributary streams as are safely navigable." It is stipulated in the policy that it shall be lawful for the boat to "sail to, touch, and stay at, any ports and places thereunto obliged, by stress of weather or other unavoidable accident, without prejudice to this insurance;" and "in case of any loss or misfortune, it shall be lawful for the assured, etc., to sue, labor, and travel, for the defense, safeguard and recovery of the said vessel, or any part thereof, without prejudice to this insurance; to the charges whereof the said insurance company will contribute according to the rate and quantity of the sum herein insured." "But no partial loss, or particular average, shall in any case be paid unless amounting to five per cent."

At the trial it was proven to the jury that the boat was owned by the plaintiff in Cincinnati; was laden with half freight for New Orleans and the intermediate ports; and on her way down

Red river, bound for New Orleans, broke her shaft so as to render her unable to proceed. The break was within the perils incurred of risk. When the accident occurred, New Orleans was the nearest port where the boat could refit. She was unable to proceed without being towed, and was towed into port by another boat. The crew assisted in taking her into port, and about the repair while in port; and so soon as the repair was completed, the boat proceeded on her usual business. While the crew were so employed they were paid and subsisted by the assured. The damages claimed were: 1. The new shaft, one hundred and seventy-nine dollars and sixty-five cents. 2. For towing the boat to New Orleans, one hundred and fifty dollars. 3. For the wages and subsistence of the crew while getting into port, three hundred and thirty-six dollars and eighty cents. 4. For the wages and subsistence of the crew while in port repairing, four hundred and sixty-five dollars and ninety-two cents. Amounting, with interest from April 28, 1828, to thirteen hundred and eighty-one dollars and forty-nine cents; for which sum a verdict was taken, subject to the *opinion of the court, upon the questions of law arising [306 upon the facts. It is now submitted to the court upon the facts, to say what items in the bill are chargeable against the insurers, and it is agreed that the verdict and judgment shall be entered for the sum allowed with interest, if it shall amount to five per cent. upon the amount insured.

CONOVER and E. KING, for plaintiffs, cited Park on Ins. 125; Marsh. on Ins. 140, 539, 540, 725, 726; Phil. on Ins. 253, 330, 344, 345; Ab. on Ship., pl. 3, ch. 8, sec. 8; Beawes' Lex Mercatoria; 3 Kent's Com. 187, 188, 250; Samp. on Com. Law, 168; 2 Term, 414; 4 Term, 206; 12 East, 643; 1 Burr. 347; 4 Dal. 246; 1 Bin. 592; 1 Caine, 573, 576; 2 Caine, 262, 273, 276; 7 Johns. 424; 8 Johns. 245; 11 Johns. 315; 1 Conn. 242; 3 Mass. 239; 4 Mass. 548, 554.

N. WRIGHT and C. HAMMOND, contra, cited 1 Term, 127; 7 Johns. 431; 11 Johns. 315; 1 Conn. 243; 4 Mass. 551; Marsh. on Ins. 462, 463; Phil. on Ins. 331; 3 Maule & Sel. 482; 2 Caine, 263, 264; 4 Ohio, 234.

Judge WRIGHT delivered the opinion of the court:

The defendants object to the charges for towage, for the wages

and subsistence of the crew, either in making port or while in port repairing; and claim a reduction from the charge for the shaft of one-third, upon the marine law of one-third "*new for old.*" They claim further, that so reduced, the amount will be less than five per cent. on the sum insured, and so will not be within the policy.

This insurance is, for time, upon the boat, her machinery and furniture, and stipulates for their safety. The policy does not insure a profitable freight, or against loss of wages or subsistence. "On a policy upon a ship," says Lord Mansfield, in Robertson *v.* Ewen, 1 Term, 127, "sailors' wages or provisions are never allowed in settling the damages. The insurance is on the body of the ship, tackle, and furniture, and not on the voyage or crew." See also 7 Johns. 431; 11 Johns. 315; 1 Conn. 243; 4 Mass. 551.

It is urged, that inasmuch as the wages and subsistence of the crew would fall within the common principle of *general* 307] **average*, these items are within the policy. Is this so? General average or loss is, where individual loss or injury is incurred for the common good of those having a community of interest and benefit, and is apportioned to the interest benefited. When, by stress of weather or other imposing danger, it becomes necessary for a ship to depart from her course and seek shelter in the nearest port; when hostile force has interrupted the voyage and exacted the payment of ransom; and in cases of jettison, when the freight of a particular individual is thrown overboard to save residue of the cargo and vessel; these being all cases of urgent necessity, and for the good of all concerned, the loss is averaged among all, and hence comes the term of general average. In such cases the risk is imminent, and affects the vessel as well as the cargo, and the insurer on her body is interested that immediate and effective means should be adopted for her preservation, and reason and justice, as well as the law, subjects him to an average share of the loss. Phil. on Ins. 331; Marsh. on Ins. 462, 463; Maule & Sel. 402; 2 Caine, 263. The loss in all such cases is apportioned among those who gain by it. It would seem to follow, that when the vessel was made safe in port or otherwise, the insurer on her body has no common interest in what further takes place, having in view the completion of the voyage or the making freight. In these the insurer gains nothing. It is true the necessary voyage is *interrupted*, but mere delay is not sufficient to call

upon the insurer of the vessel to contribute to a general average. The Belle Creole was not driven out of her course, but pursued her voyage to New Orleans, subject by the accident only to the expense of towage to secure her safe arrival. So far, then, as relates to the wages and subsistence of the crew on the way to New Orleans, or while lying in that port, they constitute no charge against the insurer on the policy upon the body and tackle of the boat. The circumstances under which these expenses were incurred make no case for general average against such insurer.

But it is said these items are embraced in those terms of the policy which stipulate to "contribute" for "labor and travel" about the safeguard of the boat. This clause doubtless assures the plaintiffs against any *extra* labor in *securing the boat, [308 which would be the direct consequence of accidents within the perils of the insurance. In our opinion it embraces the towage of the boat to New Orleans, that being an expense necessary to her preservation and repair, and charged only till she arrived at the nearest port for repair. The clause might also have embraced the wages and subsistence of *extra* hands, had any been necessary for securing the boat, or in effecting her repair. The ordinary wages of the crew and their subsistence are only the common expenses of the boat, and are neither increased nor diminished by the accident insured against. If the insurance had been upon freight instead of the body of the boat, the question might have assumed a different aspect. But it is said more was necessary to effectual reparation of the injury than to lay the new shaft upon the deck of the boat; that labor and skill was requisite to set it in its place and put it in readiness for use. This may be admitted; and if it had been necessary to effect the repair to procure the assistance of an artificer or other person not of the crew, the wages and subsistence of such aid would have constituted a part of the *extra* expense, and been within the policy. The case made does not show any such expense; the charge is for the ordinary wages and subsistence of the common crew of the boat, a charge resting on the assured at any rate. The claim is not that their pay and subsistence was extraordinary, resulting from the accident, but that their labor was not as productive of profit to their employer as it otherwise would have been. Judge Thompson, of the Supreme Court of New York, in 11 Johns. 321, says, "the insurance is upon the ship, etc., and the wages and provisions of the

crew are no part of the thing insured. The court only look to the thing itself, which is the subject of the insurance." 7 Johns. 432.

Counsel urge that this is an insurance *on time*, and that in such cases a different rule prevails from that which obtains an insurance upon the body of the ship for a particular voyage. The reasoning upon this point does not very forcibly impress our minds. The contract is, that the boat shall remain uninjured for the period of four months, or if she be injured within that time, to an amount greater than five per cent. on four thousand dollars, 309] that the insurer will indemnify for it. *It is not a contract of indemnity against loss of profit or freight carried, or which might be carried for the four months, nor a stipulation that in case the boat be out of employ, the insurer will, while she is out of employ, pay and subsist her crew. The owner has not contracted with the insurer for a profitable, or any employment for the boat for four months, or any other time.

It is a settled rule in the law of marine insurance, to reduce charges for repairs one-third new for old. This rule was recognized as applicable to river insurance, by this court, in Wallace v. Ohio Insurance Company, 4 Ohio, 242. But counsel urge that many of the rules which obtain in sea navigation are antiquated and arbitrary, have no application here, and should be rejected by our courts. In Wallace's case the court were exhorted to the like course, and to take upon itself the revision of the whole law of marine insurance. But in that case the court held "it safest to adhere to the doctrine as we find it settled, and to administer it as an entire system, to those who claim at our hands the administration of a part of it." The court still holds to that opinion. The rule must be applied to this case, and will reduce the charge of one hundred and seventy-nine dollars and sixty-five cents for the new shaft by one-third to the value of the old.

The loss, when adjusted upon the principles here recognized, rejecting the items for wages and subsistence, and admitting the charge for towage and two-thirds of the expense of repairs, will exceed five cent. upon the sum insured, and is therefore chargeable upon the insurer. The verdict and judgment will be entered for that amount, with interest.

JOSIAH LAWRENCE *v.* J. MCGREGOR ET AL.

Bill of lading for articles received on board steamboat A., indorsed, "Shipped at Cincinnati on board steamer T. to be reshipped at Louisville per steamer A." *Quære*, as to the obligations of the freighter in unlading to pass the falls at Louisville.

ASSUMPSIT upon two bills of lading, of the same terms and date, adjourned from Hamilton county. The following is a copy of one of the bills:

"Shipped, in good order by Josiah Lawrence, for account and risk of the shipper, in and upon the good steamboat [310 called the Amazon, whereof is master for the present voyage Captain McGregor, now lying in the Ohio river and bound for New Orleans, to say, thirty-four barrels of whisky, being marked and numbered as in the margin, and are to be delivered, without delay, in like good order and well conditioned (the dangers of the river and unavoidable accidents only excepted), at the port of New Orleans, unto Mr. Joseph S. Bogert, or unto his assignees, he or they paying freight for the said goods at the rate of seventy-five cents a barrel." On the left hand margin, at the foot of the bill of lading, these words were written: "*Shipped at Cincinnati on board steamer Tecumseh, to be reshipped at Louisville per steamer Amazon.*"

The case made on trial was this: At the date of the bills of lading, the steamboat Amazon was lying at Shippingport, below the falls, in the Ohio. The Tecumseh was lying at Cincinnati, and took in the freight to be transported to Shippingport and reshipped upon the Amazon. When the Tecumseh arrived at Louisville, the state of the water was such that the pilot declined taking her over the falls. The goods were then placed n board a flat-boat, to be carried over the falls to the Amazon. The weather being boisterous and night coming on, it was concluded, by the advice of the pilot, to detain the flat until morning. She was moored on the outside of the Tecumseh, and about daylight the next morning was run upon by the steamboat Lady Franklin and sunk, and part of the cargo lost. This suit was brought against the owners of the Amazon to recover this loss.

In giving the case to the jury, the court instructed them that,

in legal contemplation, the bill of lading bound the defendants, to carry this merchandise, *in the Tecumseh, to the Amazon*, and that they had no right to substitute any other mode of transportation but at their own risk. A verdict was then taken for the plaintiff, subject to the opinion of the court, upon that question of law. The defendants now move for a new trial, on the ground of error in the court, in the opinion expressed.

311] *STORER & FOX, for the motion, cited Phil. on Ins. 14, 182, 425–427; 1 Johns. 205; 3 Johns. 221; Abbot on Ship. 294; 2 Burr. 887; 10 East, 378; 5 Bin. 525; Peterad. 107; 15 Johns. 18; 16 Johns. 363; 4 Wend. 54; Marsh on Ins. 171; 1 Camp. 50, note; 8 Cranch, 75; Park on Ins. 191; 1 Burr. 348; 6 Mass. 205–208; 3 Wend. 289; 2 B. & P. 430, 436; 1 Conn. 184, 197; 3 Conn. 14; 8 Pick. 14; 6 Mass. 422; 7 Mass. 300; 6 Cranch, 328; Doug. 512; 2 New R. 263; 2 Bay, 223; 7 Johns. 389; 10 Johns. 129; 11 Johns. 312, 397; 8 Cranch, 74; Rocius, 131; 1 Caine, 45; 1 Gall. 444; 4 Ohio, 334.

HODGES, N. WRIGHT and HAMMOND, contra, cited Phil. on Ins. 17, 182; 1 Stark. Ev. 423; 2 Stark. Ev. 335, 345; 8 Serg. & R. 533; 2 Stark. Ev. 145; 2 S. & R. 454; 1 Gall. 443; 3 Esp. 67, 131; 6 Johns. 177; 2 Kent's Com. 327; 2 Condy's Marsh. 707; 1 Phil. Ev. 435; 1 Johns. 430; 2 Johns. 335; 10 Mass. 28; 2 Burr. 1322; 4 Ohio, 345; 3 Serg. & R. 453; 15 Johns. 39; Story on Bail. 329.

WRIGHT, J., delivered the opinion of the court:

Several questions have been raised and elaborately argued by counsel in this case, but we confine our inquiries to one. Was the opinion given by the court to the jury correct? A decision of this question necessarily involves the inquiry whether the memorandum in the margin of the bill of lading did not form a part of the contract of affreightment, and if so, whether the Tecumseh was not to be held subject to the usage of the river as to lighting over, or draying freight round the falls. If the marginal memorandum, connected with the bill of lading, is to be taken as part of it, and of the contract, it would be understood as an undertaking to carry in the Tecumseh from Cincinnati to the Amazon, and in her to New Orleans. Whether these marginal memorandums are esteemed a part of the bill of lading or not, may depend on the usage of the

river, upon which we are not well informed. Our own opinions upon these questions do not perfectly harmonize. We doubt if the judge in *giving the law to the jury did not express him- [312
self stronger than the law would warrant, and the difficulty is increased by the consideration that we are without certainty as to the precise language used by him. The opinion, whatever it was, no doubt influenced the verdict, which was taken subject to our opinion upon the law applicable to the facts. In such cases we think it best to give a new trial, that a more full investigation of the facts may be had before another jury, and an opportunity afforded for inquiry into the usage of the river in reference to this kind of bill of lading. Such light may be hereafter shed upon the question as will enable us more satisfactorily to settle the law arising upon it.

New trial is awarded. Costs to abide the event.

UNION BANK OF GEORGETOWN *v.* THE ADMINISTRATRIX, HEIRS AND TENANTS OF R. J. MEIGS.

Scire facias against heirs to subject real estate of ancestor for debts should specifically descri be the lands sought to be charged.

THIS is a *scire facias* to charge real estate of the decedent in execution. It was issued November 27, 1830, and served May 6, 1831. The writ sets forth that the plaintiff recovered judgment in the Supreme Court, at October term, 1828, against the administratrix of Meigs, upon which execution issued, and some personal property was taken and sold, making a small part of the debt, and *nulla bona* returned as to the residue, and prays a remedy. The command of the writ is that it be made known to the administratrix and to the heir at law (who are named), and to the tenants (without naming any one), of all and singular the lands and tenements in said court, whereof the intestate died siezed, to show cause why execution should not be made of the balance of said judgment of these lands and tenements. The return is, "Served the within on Mary Sophia Jackson (the heir), and Sophia Meigs (administratrix), May 6, 1831, in presence of A. V. D. Joline and Silas Cooke, and on

313] John Brophey, *October 10, 1831, in presence of Daniel Nicoll and William Greene, and on J. E. P. Putnam and William Deval, October 12, 1831, in presence of David Barber and George Barker."

The administratrix and heir plead jointly:

1. That the judgment was recovered against the executrix in her representative character, and she was then and ever since had been a resident in said county, her letters of administration being still in full force.

2. That at October term, 1831, of the court of common pleas of said county, the said administratrix filed her petition for the sale of all the real estate of the deceased in said county which would be required to pay debts, according to law, and then obtained an order of court for the sale, which is still in force.

The plaintiff replied to the first plea that the date of the *fi. fa.* upon which the return of *nulla bona* is made is more than five years before the *scire facias* was sued out; and to the second, that more than five years had elapsed since administration was granted before the date of the *scire facias*. To these replications there is a general demurrer.

NYE, in support of the demurrer, cited 22 Ohio L. 118, 124, 129; 29 Ohio L. 229, 231, 236, 237; 25 Ohio L. 19; 2 Cranch, 386; 3 Ohio, 466; 2 Ohio, 65; 3 Bur. 456; 1 Wm. Blk. 451; 3 Dal. 378; 4 Dal. 372; 1 Bin. 601; 4 Conn. 209; 2 Peters, 627.

VINTON, contra, cited Swan Land Law, 383; 22 Ohio L. 158; 29 Ohio L. 67, 73, 74, 109, 236; 18 Ohio L. 91; 4 Mass. 620; 9 Mass. 118, 119; 12 Mass. 570, 573; 17 Mass. 380, 385, 386; 1 Ohio, 467; 2 Ohio, 292; 3 Ohio, 225; 1 Saund. 219, n. 8; 1 Wash. 31; 1 Munf. 1; 4 Munf. 289; 2 Hen. & Munf. 8; 1 Eq. C. Ab. 554; 2 Wm. Blk. 824; 1 Term, 285.

WRIGHT, J., delivered the opinion of the court:

We will now only consider one of the several questions discussed on this demurrer. Is the writ of *scire facias* and return 314] sufficient to give the plaintiff a right to execution? *The writ in this case stands in the place of a declaration, and must show in the plaintiff a title. This *scire facias* contains no suggestion of any particular real estate of which the intestate died seized, and

which it is sought to charge in execution, or that any particular person is tenant of any real estate, late the property of the decedent. The return leaves everything equally uncertain. How can the court award execution against any particular land upon such a proceeding? In McVickars *v.* Heirs of Ludlow, 2 Ohio, 246, this court say, "Writs of this description are entered on the record with a mere formal charge, etc., as the declaration in the cause. They must, therefore, contain everything that is required to constitute a good declaration; or, in other words, they must contain everything that is required to show a right in the plaintiff to the relief prayed for." "The *scire facias* contains an averment that lands descended to the defendants from their ancestor, but what lands, or of what value, or whether they are *now* held by the heirs subject to execution or not, does not appear either in the writ, or in the return, or in any part of the record. And if a judgment should be rendered in this case, there is nothing to guide the officer in making the levy; or if the lands descended have been sold under such circumstances as place them beyond the reach of the judgment creditor, there is nothing from which the value of the assets can be ascertained. Although the statute is silent on this point, yet the nature of the claim set up, and the uniform practice of courts in similar cases, require that the lands which may have descended should be set out in the body of the writ, or ascertained and described in the sheriff's return. The latter course seems to be the practice in the courts of Westminster. The propriety of ascertaining the lands, or their value, will appear from this consideration that the heir is not answerable beyond the amount of assets descended, and it may be that he has paid other claims against his ancestor to the amount of the assets which came to him by descent. 1 Strange, 665." In Wolf *v.* Pounsford, 4 Ohio, 397, the case of McVickars *v.* Heirs of Ludlow is cited and confirmed. The court in the last-named case declined to settle the practice, and left the subject open, with the remark, "That the plaintiff must *see that in some part of [315 the proceedings the assets are shown to have descended to the heirs, so that an issue may be formed, and the matter reduced to a certainty." We think the better practice would be to make the suggestion in the writ of what lands are descended, by whom held, and to set out all the material facts essential to the right to

proceed against the particular estate he seeks to charge. Upon the authority of these cases this writ is clearly bad.

The demurrer is sustained, but the plaintiff has leave to amend upon payment of costs.

We leave the other questions in the case wholly unnoticed.

TRUSTEES OF BLOOMFIELD *v.* TRUSTEES OF CHAGRIN.

The mother of an infant pauper settled in one township, does not change the infant's residence, by marrying a second husband settled in another township, and there residing without the infant pauper.

THE plaintiffs declared in debt for two hundred dollars under the act for the relief of the poor. 22 Ohio L. 331. There are two counts: 1. That one Richard Brown, who had his legal settlement in Chagrin, came into Bloomfield and became lame, diseased, a pauper, and unable to support himself, by reason whereof the plaintiffs were obliged to provide for his support during his illness, and to expend large sums for necessaries and medical aid, viz: two hundred dollars, and that so the defendants became indebted to the plaintiffs in the sum of two hundred dollars. The second count is for meat, drink, etc., furnished for one Richard Brown, a *pauper and inhabitant of Chagrin*, who became sick, etc., in Bloomfield. Plea *nil debet*, with a notice of special matter in bar.

Upon the trial, before the jury, it was agreed by the parties that the father and mother of the pauper were legally settled in Hampshire county, Massachusetts, and that the father died there in 1820, leaving the mother a widow, and Richard, the pauper, an infant. The mother, with her infant son, afterward removed to Chagrin, in Cuyahoga county, and resided there one year and three months from January 15, 1823, without being warned out, and there married Levi Brown, who was then a resident of Per-
316] kins, in *the county of Huron, and had a legal settlement there. She removed with her husband to another township, Cuyahoga county, where she died in five months thereafter. Richard, the pauper, did not go with his mother, but resided in some township in Geauga county, for eighteen months, and then at

Bloomfield, in Trumbull county, became disabled by a wound, and a township charge. At the commencement of this suit he was still in his minority. The overseers of the poor in Bloomfield removed the pauper to Chagrin, and offered him to the trustees, who refused to receive him. They, at the same time, presented their account and demanded payment, which was also refused. Upon these facts the jury found a special verdict for the plaintiffs: Debt, one hundred and twenty-one dollars and seventeen cents (the amount of the account), and ten dollars and forty-nine cents damages, if the court should be of opinion, upon the facts, that the pauper, on April 1, 1830, had a legal settlement in Chagrin; but if the court should be of opinion, upon the facts, that at that time the said pauper had no legal settlement in Chagrin, then the jury found for the defendants. The questions arising on this verdict were adjourned for decision here from Trumbull county.

C. Pease, for plaintiff, cited 3 Ohio, 94; 4 Black. Com. 488.

Card, contra, cited 22 Ohio L. 381; 9 Mass. 201.

Judge Wright delivered the opinion of the court:

By the law of Ohio, 22 Ohio L. 320, persons residing more than one year in any township, without being warned to depart, gain a settlement in such township. The same act provides that in case a pauper shall require relief in any other than the township of his settlement, the overseers of the poor shall provide for him, and when he is in proper condition to be removed, shall remove him to the township of his settlement; and if payment of all reasonable charges and expenses for the support and removal be refused, the same may be recovered by action of debt.

The mother of Richard Brown, after the death of his father, acquired a legal settlement in Chagrin. Richard, *being then [317 a minor with his mother, acquired from her a derivative settlement in the same place. At common law and upon general principles all persons incapable of gaining a settlement in their own right, have that of the person upon whom they depend for support, and who has control of their persons and a right to their services. Upon this principle children have the settlement of their fathers, and *femes covert* that of the husband. 16 Mass.

123; 17 Johns. 89; 20 Johns. 282; 3 Ohio, 101. At the father's death the mother becomes head of the family, and until the law otherwise disposes of them, has the same control over the minor children that the father had, and the child being incapable of acquiring a settlement for himself, derives one from her. 1 Burr. Set. Cas. 64; 1 Ld. Raym. 41; 2 Ld. Raym. 1473; 2 Strange, 746; 16 Mass. 139; 17 Johns. 41; 20 Johns. 1452. Richard Brown, having acquired through his mother a legal settlement in Chagrin, did not lose it by his residence in Geauga county, though for a longer period than a year, because being still a minor, he had no capacity to acquire a settlement for himself. 3 Ohio, 103.

The counsel for the defendants insist that the settlement of the mother, by her second marriage, was drawn to that of her second husband, and that a derivative settlement was thereby cast upon her infant son in Cuyahoga, or in Perkins, in Huron. Mr. Justice Powell, in Cumner *v.* Milton, 2 Salk. 528, thus lays down the law: "A mother can not gain a settlement for her children by a former husband in the parish where her second husband is settled, being under coverture, and having a settlement there herself, only as a part of her husband's family." See also 14 Petersd. Ab. 315. In Salk. 482, pl. 35, it is said the children of the first marriage, under seven years of age, shall go with the mother only for nurture, and be kept by her at the charge of the parish where they are settled. As we understand the law, the settlement which a mother derives from her husband by marriage, is not cast upon her children by a former marriage. The second husband has no legal control over his wife's children, by a former marriage. He has no right to their services, and is not bound to support them; consequently they can *derive no settlement from him. 1 Burr. Set. Cases, 2; Carth. 449; 16 Mass. 52, 140; 14 Petersd. Ab. 315. The settlement of Richard Brown upon the facts was in Chagrin, on April 1, 1830.

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The defendants have filed a motion in arrest of judgment, upon two grounds: 1. Because it does not appear in the declaration that Brown had a legal settlement in Chagrin. 2. Because it does not appear that Brown had not a legal settlement in Bloomfield. This is a special verdict and subject to the control of the court, and if it be true that one count is bad and the other good, it will be applied to the good count. The first count is, unquestionably,

free from the objections taken, and good in law. The verdict will be entered on that count. We leave untouched the objections urged to the second count.

Judgment for the plaintiffs on the verdict.

ANDREW HARTER *v.* MARY HARTER.

In petition for a divorce, where petitioner resides in one county and defendant in another, service of summons is not sufficient. Public notice must be given in a newspaper.

THIS case was reserved in the county of Delaware. It is an application for divorce.

The facts of the case, so far as it is necessary to state them, are as follows: The petitioner resides in the county of Delaware, and the defendant in the county of Perry. The petition was filed in the county of Delaware, a summons was issued directed to the sheriff of Perry, which was by him duly served and returned. No other notice of the pendency of the petition was given. No copy of the petition delivered to the defendant.

PARISH, for the petitioner, submitted the case without argument.

Judge HITCHCOCK delivered the opinion of the court:

*Perhaps there is no statute in Ohio more abused than the [319 statute concerning "divorce and alimony." Perhaps there is no statute under which greater imposition is practiced upon the court and more injustice done to individuals. It seems to be considered, by a great portion of our community, that the marriage contract is the least obligatory of all others, and that nothing more is necessary to dissolve it than that application should be made to this court to register a decree to this effect. Not unfrequently a husband, who has by cruelty driven his wife from her home, seeks to be divorced from her, charging her with willful absence. And there are cases where the adulterous wife seeks a similar remedy, charging the husband with extreme cruelty. The hearings are

generally *ex parte*. Witnesses are examined, friendly to the applicant, and it is almost, if not utterly impossible, for the court in most instances to arrive at the real truths of the case. I would not be understood that there are no meritorious cases. That there are some such there can be no doubt. But of the great multitude of cases which are before this court I am confident that by far the greater number are not of this class. Aware of these circumstances, and aware, too, of the immoral and mischievous tendency of an easy dissolution of this most solemn of all contracts, we have ever been disposed to give a strict construction to the law, and not to hear a case unless the applicant brings him or herself within both the letter and spirit of the statute.

The second section of the "act concerning divorce and alimony," passed January 7, 1824, 29 Ohio Stat. 431, provides that in all cases where application is made for divorce, and the party defendant resides in the county where application is made, personal service shall be made by summons and by copy of the petition. But in case the defendant does not reside in the county, then "public notice *shall* be given in one of the newspapers in the state for three months." In the case before the court the defendant does not reside in the county of Delaware, where the application was made, still "public notice" in a "newspaper" has not been given. It may be thought that the professed object being that a defendant 320] *may have notice, this object would be as well, nay better, secured by the service of a summons, than by publication in a newspaper in some distant part of the state. Such would probably be the opinion of the members of this court, if we were about to legislate upon the subject. But this is not our business. It is our province to *construe*, not to *make* laws. By the act of 1822, upon the same subject, which was repealed by that of 1824, *personal notice* was required in all cases where the defendant resided out of the state. This provision is left out of the law of 1824, and notice by publication substituted. This must have been done by design. What induced the legislature to make this change we know not, nor is it necessary for us to inquire. We are bound, however, to suppose it was done upon good and sufficient reason. Having been done, it only remains that we should give it effect.

Even should the court presume to substitute a summons in lieu of the publication, the service in the case before us would be de-

fective. Where service is made by summons the law requires that a copy of the petition should be delivered to the defendant. This has not been done, and upon neither ground are the parties properly before the court. We will not, however, dismiss the cause. It may be continued for notice.

JOSEPH COOPER *v.* THOMAS HALL.

Where, by erecting a dam the water is flowed back in the bed of a stream, and raised against the land of an adjoining proprietor, no action lies, unless some actual injury is sustained.

THIS cause was reserved in the county of Warren, upon a motion for a new trial.

It was an action on the case for a nuisance.

The declaration contains two counts: The first count alleges that the plaintiff, on May 1, 1829, was, and for a long period before that time had been, the owner of a certain tract of land in the county of Warren, and between the Miami rivers, and that upon *January [321 1, 1830, he was possessed, and still is possessed, of a certain ancient water-mill, over and upon a certain river or water-course, commonly called the Little Miami river, in the same county of Warren, and that he had, and of right ought to have, the free current, course, use, and benefit of the water of said river, running and flowing from his said mill down the said river, without the same being penned back upon the said mill or the wheels thereof, to the obstruction of his said mill, and that defendant, on September 1, 1830, erected a dam in and across said river, below the mill of the plaintiff, and upon the land of the defendant; by means whereof, the water was set back upon the mill, mill-wheels, and tail-race of the said plaintiff, so as to obstruct the operation of his said mill, to his great damage.

In the second count the injury complained of was that, in consequence of the erection of the dam, the water of the river was retarded in its course, and heightened in the bed of the river.

To this declaration the general issue plea of not guilty was filed.

Upon the trial of the cause, much testimony was introduced; some of which was contradictory. The weight of evidence, however, seemed to be, that although the water was, in consequence of the dam erected by the defendant, somewhat heightened in the channel of the river, opposite to a part of the plaintiff's land; yet it was not caused to flow back upon the plaintiff's mill or mill-wheels.

The court charged the jury that the backing of the water in the channel of the river upon that part of it which passed along the land of the plaintiff, was not actionable, unless productive of *real* or *substantial* injury.

A verdict was returned for the defendant. Whereupon the counsel for the plaintiff moved for a new trial, on the ground that the court mistook the law in the charge to the jury.

CORWIN and Ross, for plaintiff.

A. H. DUNLEVEY, for defendant.

322] *HITCHCOCK, J., delivered the opinion of the court:

It is matter of regret with the court that this cause should have been submitted without argument, as we consider the question involved not only important, but difficult of solution. In every case we are anxious to administer justice according to strict law; and in no class of cases would we be more scrupulously exact than in those which arise between adjoining riparian proprietors. Water power, for propelling machinery, is not abundant in Ohio; and the wants of the public require that what there is, should be used to the best advantage. Still it is the duty of the court to see that no one, in an attempt to use or improve that which is his own, shall presume to interfere with the rights of his neighbor. For any injury done to the person or property of another, where the injury is immediate, upon the commission of an unlawful act, the person injured may have an action; and this, although the injury complained of is *ideal*, not real or *substantial*. Every entry upon the land of another, without right, is unlawful, and for such entry, the owner of the soil may have trespass, and shall recover damages, if for nothing else, for the treading down his grass. The damages may be merely nominal, but inasmuch as the rights of the person trespassed upon have been violated; and this, too, by

an unlawful act, his right of action is complete. So, too, a person assaulted, although he has sustained no actual, or rather no *real, substantial* injury, may have his action. These principles are too well settled to be controverted. And they are so settled, not only that the absolute rights of a plaintiff may be secured, but that a defendant who has attempted, *unlawfully*, to violate those rights may be punished.

But when the act complained of is itself lawful, a different rule prevails. It is only when some *actual* injury is done that a right of action ensues. Every man has a right to use his own as to himself seems proper; but he must be careful so to use it that no injury is done to another. *Sic utere tuo ut alienum non abutere*, is a maxim of universal application. Here we have the distinction between the action of trespass, properly so called, and the action of trespass on the case. *The action of trespass may [323 be sustained where the injury complained of is immediate upon the commission of some unlawful act; trespass on the case where the injury is consequent upon the commission of an act in itself lawful. In the latter case, however, the injury must be *real* and *substantial*.

In the case before the court, it can not be pretended that the act of the defendant in erecting his dam, was unlawful. Nor is the injury complained of, immediate upon the commission of that act. It is consequential. Under these circumstances the action is well conceived. It is trespass on the case for a nuisance.

What, then, are we to understand by the term *nuisance*? Perhaps it is as well defined in 3 Petersdorff's Com. Law, 550, as in any of the books. It is there said that "the term *nuisance* signifies anything that causes *hurt*, *inconvenience*, *annoyance*, or *damage*." If a thing complained of, causes neither of these, it is difficult to discover upon what principles it can be called a nuisance. But if it causes either in the least degree, the person creating it must be answerable for consequences. No matter how small the damage, the person sustaining it will have a right of action. But there must have been some *damage in fact*, not merely in *imagination*. These were the considerations which influenced the court in the charge to the jury.

A similar principle is held by the Supreme Court of the State of New York. 3 Caine, 307. In that case, however, the court go much further than is necessary to justify the charge in the case now be-

fore us. Every *riparian* proprietor of land has a right to the use of the water flowing in the river, so long as it flows adjacent to his land. But he must so use it as not to injure an adjoining proprietor, either above or below him. For any such injury he will be answerable. But to subject him to an action, the injury must be *material, substantial.* Such is the principle as laid down by Chancellor Kent, in his Commentaries (vol. 3, pp. 53, 54). And it is a principle consistent with reason and common sense. It may be difficult, in some cases, to ascertain whether the injury be *material;* but it is a question proper for the consideration of a jury.

324] *There is another consideration which it may be proper to mention. The Little Miami is by statute declared to be a navigable river. Although in such case this court have decided, Gavit's Adm'rs *v.* Chambers, 3 Ohio, 495, that the adjoining proprietor owns, for certain purposes, to the center of the river; yet it would seem to be absurd that such proprietor should have an action against his neighbor, when that neighbor has done him no other injury than to raise the water in some small degree within the banks of the river, without doing him any *actual* damage.

Upon the whole, a majority of the court are of opinion that there was nothing erroneous in the charge of the court to the jury; the motion for a new trial must be therefore overruled, and judgment entered upon the verdict.

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Horace Curtis *v.* The State of Ohio.

A person who makes it a business to keep a house of entertainment for travelers, is a tavern-keeper, within the statute, though he keeps no liquor in his house, for any purpose.

This was a writ of error brought to reverse a judgment rendered against the plaintiff in error, by the court of common pleas of Washington county, and was adjourned here for decision by the Supreme Court.

The case was this: Curtis was indicted for that "on the first day of September, in the year of our Lord one thousand eight hundred and thirty-one, and from that day to the present term of this court, with force and arms, at Belpre township, in said county of Wash-

ington, the said Curtis did keep a tavern, without being duly licensed as a tavern keeper, contrary to the statute, etc.

The indictment was found at May term, 1832, and was predicated upon the following provision of the statute: "If any person shall keep a tavern, or shall retail spirituous liquors, or shall vend or sell any spirituous liquors of any kind, to be drank at the place where sold, or shall vend or sell such spirituous liquors by less quantity than one quart, without being duly licensed as a keeper of such tavern, each and every person so offending, shall *forfeit and [325 pay for each offense any sum not exceeding one hundred dollars, nor less than five dollars," etc.

The evidence given on the trial is set forth in the subjoined bill of exceptions: "The defendant, at the time alleged in the indictment, and thence hitherto, had received and entertained travelers and their horses, for compensation, at his house, situate upon his farm in Belpre township. That defendant's house was and is situate near the junction of several leading and public roads, upon which there was much traveling, and that it was usual and customary for travelers to make the defendant's house a stopping place either for breakfast, dinner, horse-feed or lodging; that such were in the habit of stopping there without invitation, and with no more ceremony than is usually practiced at a tavern. That the defendant was never known to turn any such persons away, but, on the contrary, furnished food and lodging, stabling and horse-feed, as desired, receiving therefor reasonable compensation." It was further proved that the defendant did not, during such time, sell, vend, or retail any vinous or spirituous liquors to any person; that he did not give or furnish any such liquors to his guests or any other person, and that he did not keep any in his said house. Upon the foregoing facts, the court of common pleas charged the jury that if they should find the facts as stated in the bill of exceptions to be true, such facts constituted a tavern-keeper within the statute, and an offense under the statute. The jury found the defendant guilty, and he was adjudged to pay a fine of ten dollars and costs. To reverse this judgment the present writ of error was brought.

GODDARD and CONVERSE, for the plaintiff in error, contended that the term *tavern*, as used in the statute, embraced only those who kept public houses for supplying guests with liquors, as well as

food and lodgings. They cited Johnson's Dictionary, Shakespeare, and Swift, and, as being in principle analogous, Parkhurst v. Foster, 1 Salk. 387.

NYE, for the state, argued, that persons who made it a business regularly, and whenever called upon, to supply travelers and their 326] horses with entertainment, for compensation, *and who was notoriously known as furnishing such supplies, were tavern-keepers, within the statute, and subject to its penalties. On the construction of the statutes, he cited 6 Bac. Ab. 380; 2 Cranch, 386. The case cited from Salkeld was considered as bearing no analogy to this.

The court were divided in opinion: Judges HITCHCOCK and COLLET, for reversing the judgment; Judges LANE and WRIGHT, for affirming it. So, according to the rule of the court, the judgment was affirmed, no opinion being given.

JOHN PRAY v. W. OLIVER AND M. BAUM.

W. OLIVER AND M. BAUM v. JOHN PRAY.

JOHN PRAY v. W. OLIVER AND M. BAUM.

Case of practice and of facts.

THESE cases came before the court, by adjournment from the county of Wood. By an agreement of counsel they were submitted for a final decision upon the merits of the whole matter in controversy.

The first was an action of assumpsit, the object of which was to recover back purchase money paid for land, alleged to have been sold to Pray, by Oliver and Baum. In this action, in the court of common pleas of Wood county, May term, 1828, Pray obtained a verdict and judgment for three thousand two hundred and twenty-six dollars and ninety-six cents. Notice of appeal was given, and an appeal bond executed. But by the mistake of the clerk, the penalty of the appeal bond was fixed at only double the amount of the damages for which judg-

ment was rendered, and did not cover the costs. For this defect of the bond, on motion of Pray, the Supreme Court quashed the appeal.

*The second case, Oliver and Baum against Pray, is a bill [327 in chancery, brought by the complainants against Pray to obtain a new trial, upon the ground of the mistake of the clerk in preparing the appeal bond. The bill sets out the whole matter in dispute, making a case of strong equity for the complainants. Pray answered this bill, and a great deal of testimony was adduced on both sides. The court of common pleas of Wood county awarded a perpetual injunction against Pray, taking execution upon his judgment. From this decree Pray appealed to the Supreme Court. That court, in special session at Columbus, December term, 1829, awarded a new trial of the suit at law, upon terms which were acceded to by the parties. This new trial was had before the Supreme Court of Wood county, at July term, 1830, when Pray became nonsuit. A motion was then made by Pray's counsel to set aside the nonsuit and direct a new trial. The decision of this motion was adjourned to the special session at Columbus, where, at the December term, 1830, it was overruled, but no final judgment rendered, and the cause was again remanded to the Supreme Court of Wood county, where the chancery cause was still pending.

At the July term, 1831, of the Supreme Court, in Wood county, the counsel upon both sides entered into an agreement to submit the whole matter to the decision of the court, with leave for Pray, to file a cross bill, and with an understanding than an issue out of chancery should be made, if deemed necessary by the court, to determine any material fact in the cause. The cross bill was filed, answers put in, and further testimony taken; upon all which matters the case now was heard and decided.

The final decision of the court was in favor of Oliver and Baum: but that decision being predicated altogether upon the facts, as made out by the proofs in the cause, which could not be made intelligible, but by a most voluminous report, which would be of little value to the profession, it is omitted.

T. W. Powell and O. Parish, for Pray.

C. Hammond and P. B. Wilcox, for Oliver and Baum.

328] JONATHAN RAWSON *v.* GAINS BOUGHTON.

EZEKIEL A. TURNER *v.* GAINS BOUGHTON.

On application to redeem lands sold for taxes, if judges of the common pleas are disqualified from sitting, case may be certified to the Supreme Court.

THESE two cases, involving the same principle, were adjourned here for decision from the county of Lorain. In each case, the plaintiff petitioned the court of common pleas to redeem lands sold for taxes and purchased by the defendant. One of the judges of the court of common pleas was interested in the subject matter of the petitions; the president judge had been of counsel for one of the parties in the matter in litigation. These facts being known to the judges of the common pleas, they certified the cause to the Supreme Court, for decision, under the provisions of section 63 of the act to regulate the practice of the judicial courts. In the Supreme Court a motion was made to dismiss the cases, for defect of jurisdiction, the decision of which motion was reserved, and adjourned.

No counsel appeared on either side.

By the COURT:

The application to redeem lands sold for taxes is to be made to the court of common pleas of the county where the lands lie. Notice of this application is to be given in the newspapers, specifying its object, and describing the land proposed to be redeemed. The court are required to examine the facts set forth touching the applicant's right to redeem, and "the counter testimony of the *adverse party*, if any be offered." Upon this examination the court are required, by law, if satisfied that the applicant is entitled to redeem, "to make an order of redemption," to "award restitution of the premises, and direct that the applicant shall pay the costs of the application." The proceeding is clearly contemplated to be an adversary litigation between adverse parties. It must, consequently, be in the nature of a "*suit or action*," and comes fairly within the terms of the law under which the causes are certified to
329] us. The case is one within *the inconvenience intended to be provided for, as well as within the letter of the statute. We

would rather prefer to aid the full administration of justice by a liberal construction of the terms used, than to adopt a strained one to divest ourselves of jurisdiction. It is therefore decided to retain the cases for final adjudication, that the party may not be deprived of the remedy which the law contemplated to afford him.

GIBSON AND OTHERS *v.* DUNCAN MCARTHUR AND OTHERS.

Under the statute of February, 1824, depositions taken upon notice before the mayor of Alexandria, in the District of Columbia, could not be read in evidence. Otherwise under the law of March, 1831.

THIS case was reserved in the county of Pickaway.

It is a proceeding in chancery, but as the question decided has no connection with the merits of the case, it is unnecessary to give an abstract of the bill, answer, exhibits, or evidence.

Certain depositions were offered in evidence by the complainants, which were taken before the mayor of the town of Alexandria, in the District of Columbia. These depositions were excepted to, on the ground that, under the statute of this state, in force at the time these depositions were taken, an officer of this description had no authority to take depositions to be read in evidence in this state.

SWAN, LEONARD and CALDWELL, in support of the objection.

SCOTT, MURPHY, STANBERY and HUNTER, for complainants.

HITCHCOCK, J., delivered the opinion of the court:

The depositions offered in evidence purport to have been taken under section 72 of the practice act of February 18, 1824, 22 Ohio L. 65. At least they were taken while that act was in force, and at the time there was no other law in the state, authorizing the taking of depositions under a notice *merely*. This section provides that, under the circumstances *therein specified, the deposi- [330 tions of certain persons "may be taken, before any *justice or judge* of any of the courts of the *United States*, or before any *chancellor*,

master commissioner in chancery, *justice* or *judge* of a *supreme* or *superior* court, *mayor* or *chief magistrate* of a city, or *judge* of any *county* court, or court of *common pleas*, or *justice of the peace*, of *any* of the United States or of *this* state." Here are two descriptions of officers who are authorized to take depositions; those who derive their offices from the United States, and those who derive their offices from the several states. Of the first class is the "*justice* or *judge* of any of the courts of the *United States*." The judicial officers of the Supreme Court of the United States are styled *justices;* of the several district courts, *judges*. Before either of these, depositions might be taken under the statute. And perhaps it would not be a forced construction to say that they might be taken before the judical officers of the territorial courts of record. They derive their authority from the *United States*, and the courts in which they preside are courts of the United States.

Of the latter class are a "*chancellor*," "*master commissioner in chancery*," "justice or judge of any supreme or superior court," or of any "county court or court of common pleas," "mayor or chief magistrate of a city," or "justice of the peace of *any* of the United States or of *this state*." In some of the states the judicial officers of the higher judicial tribunals are styled justices, in others, judges. In our own state they are known by the latter appellative. All these officers derive their offices from the state authority, and before any of them, might depositions be taken under our statute of 1824.

Alexandria, however, is not a town of *any one* of the states of this Union. It is not located in *any one* of the states, but in the District of Columbia, a territory of the United States. Its "*chief magistrate*," then, as such, had no power to take these depositions, because the power is delegated only to a "mayor or chief magistrate" of a city, in *one* of the United States or of "this state." It is said that the mayor of Alexandria is, *ex officio*, a justice of the peace, and as such may exercise this power. But the statute 331] refers to justices of the *peace of "*any of the United States, or of this state.*"* The objection is not that this officer has not power to administer oaths, but that he is not an officer specified in the statute, and empowered to discharge the duty of taking depositions.

It has been urged, in argument, that the mayor of Alexandria being, *ex officio*, a justice of the peace, and that town being within

a territory of the United States, that, therefore, the court which he is authorized to hold, is a court of the United States, that he is a justice of that court, and as such justice might take these depositions. There is more of ingenuity than force in this argument. It is not to be believed that the legislature, when speaking of a "justice or judge of any of the courts of the United States," had reference to the justices of the peace appointed by the authority of the United States. Else why did they, in the subsequent part of the same section, after having named "justices or judges" of the state court, speak of "justices of the peace" as distinct officers? A majority of the court entertain the opinion that, under this statute, a justice of the peace of one of the territories of the United States had not authority to take depositions.

Nor is this the first time the question has been before the court. True, it is the first time the question has been before the court in bank, but not upon the circuit. And upon the circuit it has been repeatedly decided, and such depositions rejected. It may be thought that this is giving a strict construction to the statute. But it must be remembered that depositions are not unfrequently *ex parte*. And where there is a statute authorizing the taking of them, that statute should be strictly pursued.

In the present case it has been urged, that, inasmuch as the proceedings are in chancery, a different rule should be adopted. The statute itself makes no difference whether the proceedings are at law or in chancery. In either case depositions may be taken. And in either case the party has his election to take them under a commission or *dedimus potestatem*, or under the statute by giving notice. The complainants might have pursued the former course, and their depositions would have been well taken; but having elected to pursue the latter, they must be bound by it. They *have attempted to pursue the statute and failed. Their [332 depositions must, therefore, be excluded.

It is objected, however, that this question has been already decided in the present case, and that, therefore, it is too late to take the exception. The fact appears to be this: At the September term of the court, 1830, in Pickaway county, this case came before the court, and these same depositions were offered in evidence and objected to for the same reason as at the present time. The two judges who held the court divided in opinion as to the propriety of their reception. According to the ordinary practice

under such circumstances the depositions were read. The clerk entered upon the journal of the daily proceedings that the objection had been made and overruled. It is not customary that interlocutory decisions of this character appear upon the journal. They constitute no part of the record. But in this case it so happened that this does appear. At a subsequent day of the term the whole case was reserved for decision in bank. This very difference of opinion might have been one reason for this reservation. It certainly would have been a sufficient reason. For if these depositions are rejected there is no evidence to support the complainants' claim.

The whole case having been reserved, the counsel for the defendants again raise the objection, and insist that the decision in Pickaway can have no binding force upon this court. And such is the unanimous opinion of the court. In fact, that was no decision; owing to a difference of opinion it was impossible to decide. To hold otherwise would result in this absurdity: that a court, consisting of four members, would be compelled to decide a case upon evidence which three of them believed to be incompetent or improperly taken.

It may be well to observe that under the present existing law the same difficulty does not exist. The "act to provide for the taking of depositions," passed March 3, 1831, 29 Ohio L. 123, in section 1, has a provision authorizing justices of the peace, of the territories as well as of the states, to take depositions.

333] *These depositions being excluded on account of having been improperly taken, the case may be continued to give the complainants an opportunity to retake them.

Judge COLLET dissented.

THOMAS REILY v. MIAMI EXPORTING COMPANY.

Several judgment creditors having levies upon land agree that it shall be sold on one, a good title pass to the purchaser, and the priority of lien be settled in a contest for the proceeds. No party to such agreement will be permitted to proceed on his judgment against the land, after a fair sale.

THIS is a chancery suit, and was reserved in Hamilton county

for decision here. The facts are disclosed in the opinion of the court.

STORER and FOX, for complainant, cited 5 Ohio, 180; 6 Bac. Ab. 106; Stat. of West. 2, 13 Edw. I.; 2 Call, 183; 3 Caine, 262.

V. WORTHINGTON, contra, cited 5 Ohio, 178; 18 Ohio L. 180; 22 Ohio L. 67; 4 Ohio, 56, 459, 465; 13 Johns. 537, 550; 1 Peters, 323; 1 D. R. 389; 2 Seld. Pr. 188; 6 Term, 283; 2 Arch. Pr. 72, 76; 1 Peters' C. C. 449; 1 Wash. C. C. 463; 3 Wash. C. C. 209; 2 Saund. 72; 4 Bibb, 24, 94; 2 Tidd's Pr. 1031, 1152, 1159; 4 Com. Dig. 142; 2 Bac. Ab. 361, h; 6 Mod. 288; 1 Strange, 100; Hardin, 520; 2 Serg. & R. 142; 1 Ohio, 150, 465; 2 Ohio, 71, 290, 396, 400; 3 Ohio, 139, 223; 3 Caine, 270; 8 Johns. 365; 13 Serg. & R. 203; 2 Call, 103; Va. Rev. Code, 416; 3 Bin. 344; 7 Cowen, 540; 2 Jac. L. Dic. 481; Ter. Laws, 16; 3 Ohio L. 69; 6 Id. 147; 8 Id. 71; 10 Id. 57; 14 Id. 171; 20 Id. 68; 22 Id. 108, 201; 29 Id. 73, 101, 114; 2 Saund. 72, v. 47, m. 101, p. 472; Cro. Eliz. 209, 237, 391, 397; 3 Bibb, 344; 2 Ld. Raym. 1073, 1172; Cro. Jac. 73; 6 Mod. 290, 297; Salk. 276, 323; 2 Im. Pr. 465; 1 Seld. Pr. 535; 1 Chit. Pl. 354; Cro. Car. 328; 12 Johns. 208; 1 Mass. 403; 7 Johns. 428.

Judge WRIGHT delivered the opinion of the court:

*Reily, the complainant, claiming to have title and posses- [334
sion of certain lots of ground in Cincinnati, seeks the aid of this court to quiet his title, and to compel the defendants to release claims by them set up to the property. The proceeding is predicated on section 14 of the chancery act, 29 Ohio L. 83, which provides that "any person having the legal title and possession of lands may file a petition against any other person setting up a claim thereto; and if the complainant establishes his title to said lands, the defendant shall be decreed to release his claim and to pay the complainant his costs, unless the defendant, in his answer, shall disclaim all title or claim to such lands, and offer to give such release to the complainant, in which case the complainant shall pay to the defendant his costs, except for special reasons the court shall otherwise decree." The case made is this:

Before the year 1820, one Hafer recovered a judgment against the Cincinnati Manufacturing Company, and levied an execution on the property in question. This is the oldest lien.

The defendants recovered a judgment against that company on October 12, 1820, and levied an execution upon the lots on January 30, 1821. This judgment was suffered to lie without execution from June 19, 1823, until December 24, 1829, when it was revived by *scire facias.*

Davies and others recovered a judgment against that company on October 12, 1820, and levied execution upon the lots on January 31, 1821. Writs of *venditioni exponas* were issued upon this judgment on April 2, 1822, June 25, 1823, and November 11, 1823. On December 15, 1823, a sale was made on the last *vendi.* to Davies & Co.

Lytle and Avery recovered judgment against the company on December 27, 1820, and levied execution upon the lots on February 9, 1821. Upon this judgment and levy *vendis* were issued on March 27, 1824, and March 23, 1827, and June 16, 1829; and on the latter writ the lots were sold to the Miami Exporting Company. This judgment was assigned to the Bank of the United States on April 13, 1826.

335] *On September 3, 1829, the counsel managing the three last judgments, entered into an agreement by which the sales on the two last were set aside, and the lots subdivided in order to effect better sales, and a new inquest and appraisement had in parcels. It was further agreed that execution should be issued on the Lytle and Avery judgment, then owned by the Bank of the United States, to the November term, 1829, on which the lots should be offered for sale, and *that upon such sale a clear title should pass to the purchaser, and that the priorities of the liens under the several judgments and levies, should be tried in such mode as might be thought advisable, and the proceeds of sale appropriated accordingly.* Under this agreement an execution issued upon the Lytle and Avery judgment, on September 10, 1829, on which the lots were sold to the Bank of the United States for twenty-six thousand eight hundred and sixty dollars, upon November 16, 1829. This sale was affirmed by the court, and a deed made by the sheriff in pursuance of the order of confirmation. The Bank of the United States subsequently sold and conveyed these lots to the complainant.

The proceeds of this sale to the Bank of the United States was by common consent first applied to satisfy Hafer's judgment. As to the residue, application was made to the court to direct the dis-

tribution, in behalf of Davies & Co. and of the defendants, and of the bank. The order of distribution was brought before this court and decided in January, 1831. See 4 Ohio, 459. The court determined that the judgments of Davies & Co. and the Miami Exporting Company had become dormant, because at the time of the sale to the bank, no executions had issued upon them for more than five years, and so were not entitled to any distribution of the proceeds of sale, and that all advantage arising from the previous sales on these judgments had been waived by their voluntary appearance in court and setting them aside.

Since this decision, the Miami Exporting Company have taken out execution upon their judgment, sold a part of the premises by the sheriff, have themselves become the purchasers, and obtained a deed. Upon this they claim to hold the lots, and threaten ejectment to recover possession.

The view we take of the case renders it unnecessary to follow the counsel for the defendants through the various *points [336 discussed with much ability in the argument. The simple question is, has the Miami Exporting Company authority to go back of their agreement under which the property was sold to the Bank of the United States, and set up their judgment lien. There is no pretense of fraud or unfairness on the part of the bank, in procuring the agreement. It was understandingly made by the parties in interest, to obtain a better price for the property, leaving the right of each to be made operative upon the proceeds, to be settled as they should be advised. Their claims were made in a court of competent jurisdiction, and *settled*, the claim of the Miami Exporting Company being adjudged invalid after a severe contest. If the decision be erroneous, this court has no power to renew it; while the decision remains unreversed, it is conclusive upon the subject of it. The Miami Exporting Company was an active agent in procuring the sale on the Lytle judgment. She agreed to it, and agreed moreover, "*that a clear title should pass to the purchaser under that sale.*" "How can a clear title pass to the purchaser, if this company can be permitted to set up against the lots the lien of their judgment?" The sale, under the agreement of the parties, as it regards their claims against the purchaser, is precisely as if it had been made under either or all of the judgments claimed to be liens; the same as it regards the Miami Exporting Company as if made upon execution on her judgment.

Each of the parties agreed to support a sale for the benefit of all, and to settle their priority of lien in a contest for the proceeds of sale. It would be a gross fraud upon the purchasers, if either of the parties, having thus induced a purchase upon the assurance that a *clear title should pass*, were permitted to set up their prior lien against the lots, and a title against that passed by their own agreement to the purchaser. "It is a well-established principle in equity, that if a person, having a right to an estate, permit or encourage a purchaser to buy it of another, the purchaser shall hold it against the person who has the right;" and this rule prevails even against *femes covert* and minors. Smiley *v.* Wright, 2 Ohio, 510; 16 Ves. Jr. 253; 4 Munf. 449; 11 Johns. 564; 6 Johns. Ch. 166; 9 Mod. 35; 6 Ves. 174; Cory *v.* Girthen, 2 Mod. 40; 1 337] Vern. 136; 7 Ves. Jr. 231, 236; *5 Ves. Jr. 688, 689; 2 Atk. 33; Jeremy Eq. 387–389; 4 Johns. Ch. 65; Ohio, 318.

The title and possession of these lots being in the complainant, he makes a case for relief under the statute. The defendants will be perpetually enjoined from enforcing the lien of their judgment against these lots, and ordered to release the complainants and pay costs.

PELATIAH BLISS *v.* DAVID LONG.

THIS is a motion to quash an appeal from the common pleas. It is the same case adjourned here from Cuyahoga the last term. See 5 Ohio, 276.

By the COURT:

By the transcript now exhibited, it appears the court of common pleas, since the last continuance of this case, has retaxed the costs, and rejected from the judgment six dollars and five cents, by mistake of the clerk, included in it. The bond is now in double the amount of the judgment in the court of common pleas, and sufficient. The motion being now without any foundation is overruled.

JOHN JAMES *v.* RICHMOND AND BOSTWICK.

Book accounts, continuously and fairly kept, are to be considered an entirety until closed, and may be proven by the party, within eighteen months after such closing, under the statute of Ohio.

THIS cause came before the court in Muskingum county, and the judges not fully concurring in opinion, was reserved for decision at the court in bank.

It is a writ of error to the court of common pleas. The action in the court below was assumpsit for work and labor, goods, wares, and merchandise.

*Upon the trial of the cause the book of accounts of the [338 plaintiff was produced, and all the items charged therein, with the exception of two, were proven by disinterested witnesses. The account appeared to be continuous, consisting of a variety of charges, some of which were of older and some of more recent date than eighteen months previous to the commencement of the suit. The two items above referred to had been charged more than eighteen months before the commencement of the suit. To prove them, Richmond, one of the plaintiffs in the court of common pleas, was called as a witness. He was objected to as incompetent under the statute, but the court overruled the objection, and he was examined. To this decision of the court, the defendant, by his counsel, excepted, and his bill of exceptions was sealed. A judgment having been rendered against the defendant, this writ of error is prosecuted to reverse that judgment, and the principal error assigned, and only one relied upon, is that the court erred in admitting the testimony of Richmond.

JAMES, for plaintiff in error.

GODDARD, for defendants.

Judge HITCHCOCK delivered the opinion of the court:

The only question involved in this case is whether, where there is a running account, a part of the items of which have been charged within eighteen months previous to the commencement of a suit, and a part at an earlier period, the party making the

account is a competent witness to prove the validity of those items which are of more than eighteen months' standing. Its solution depends upon the construction of section 2 of "an act dispensing with proof in certain cases." 29 Ohio L. 122. This section enacts: "That in all cases where any claim or defense is founded on book accounts of not more than eighteen months' standing, in which is called in question the *validity* or *amount* of any such book accounts, the court or justice may, upon the trial of such action, examine 339] the party, under oath or affirmation, *touching the validity of such account or accounts, which shall be admitted as evidence on the trial, the credibility thereof being left to the jury to determine." Under this statute the practice has been different in different parts of the state, and that uniformity might be produced was one object in view in reserving this case. The inquiry arises, what is intended by the term "*book accounts*" as used in this law? A book account is an entire thing, as much so as articles of agreement, or a bond for the performance of covenants. True, it is made up of different items, charged from time to time as articles are delivered or labor performed. But when charged, it is *the whole, all* the *items* charged which constitute the account. The account itself is not closed until the dealings between the parties have ceased, or until it is done by some other act by them performed. Such must have been, we believe, the understanding of the legislature, and if so, then a "book account" can not be said to be of eighteen months' standing, until it shall have been closed for this period of time.

A case arising under this statute is somewhat analogous to a case under a statute of limitations. And under those statutes we have uniformly held, that to ascertain whether an account was barred, reference should be had to the items last charged.

Had the legislature intended that the testimony of the parties should have been confined to those *items alone* which were charged within eighteen months, they would so have expressed it. They would have referred to the *items*, not to the "account."

It would not be sufficient to bring a case within the statute, that one item had been charged within eighteen months, after the lapse of a great length of time between it and the next preceding charge. The transactions must be apparently fair and the account must have been continuous. In such case the facts may well be supposed to be within the recollection of the party, and his testimony

may with safety be received. In the case of Marshal and others v. Bend, Johns. 67, this construction was given to a similar statute, and we concur in the opinion of the court expressed in that case.

*We do not undertake to determine whether books of ac- [340 counts of more than eighteen months' standing may or may not be given in evidence. Or if given in evidence, by what description of testimony they shall be supported. Such accounts are admitted in some of our sister states, and to a certain extent have been admitted in our courts. There is not, however, as we believe, any settled practice upon the subject. Nor is the case now presented such a one as to render it necessary or even proper to settle such practice. We are now called upon to give a construction to the section of the statute before referred to. And in our view of this statute the court of common pleas decided correctly in permitting Richmond to testify. The judgment of that court must therefore be affirmed.

BRAZEE AND CARROL, ADMINISTRATORS DE BONIS NON OF JACOB KITTRIDGE, v. BLAKE AND GUY, EXECUTORS OF ROBERT GUY.

Where, pending an action on a bond against four defendants, one of them dies, and the suit proceeds to judgment against the survivors, in a *scire facias*, to make the representatives of the decedent parties, upon the plea of *non est factum*, it is sufficient to set forth the substance of the bond, and it is unnecessary to produce the record of the judgment, or evidence of a breach of the condition, or of the damages sustained.

Non est factum, in such a case, is a material issue.

Notice with the general issue must be special, in the character of a plea.

THIS cause came before the court in the county of Gallia, and in consequence of some difference in opinion of the judges, was adjourned for decision to the court in bank.

It is an action, by *scire facias*, to make the defendants parties to a judgment rendered by the Supreme Court in Gallia county, at the April term, 1828, in favor of the plaintiffs, against Benjamin Whitney, James Jones, and John Noland. The case set forth in the *scire facias* is as follows: On May 7, 1823, Moody and Co. commenced a suit in the court of common pleas of Gallia

county, against Whitney, Jones, and Noland, together with the decedent, Robert Guy, he then being in full life, upon a bond with conditions. Upon trial in the court of common pleas, judgment was rendered against the plaintiffs, and the cause appealed to the Supreme Court. During the progress of the suit, Moody, one of
341] the plaintiffs, died. His death was suggested *upon the record as is provided by statute, and the cause continued to be prosecuted by Kittridge, his survivor. Subsequently, and before the final determination of the cause, Kittridge died, and Nathaniel S. Cushing, his executor, was made plaintiff. Next, Robert Guy, one of the defendants, died. His death was suggested, and the suit proceeded against Whitney, Jones, and Noland, the surviving defendants. Afterward, Cushing, the executor of Kittridge, died, and Brazee and Carrol, administrators *de bonis non* of Kittridge, were made plaintiffs. Previous to the death of Guy, the defendants in this original action had pleaded *non est factum* to the declaration. To this plea a notice was attached of special matter to be given in evidence, conceived in the most general terms. At the April term, 1828, the cause was submitted to a jury, who returned a verdict in favor of the plaintiffs, assessing the damages by reason of the breach of the condition of the bond, at five hundred and sixty-one dollars and ninety-one cents. Upon this verdict, judgment was rendered. The *scire facias* then alleges that this judgment "remains in full force and effect, in no way vacated, reversed, or annulled." To this judgment it is sought, by the *scire facias*, to make the defendants, in their capacity of administrators, parties.

To the *scire facias* the defendants, Blake and Guy, pleaded that the writing obligatory, declared upon in the original suit, was not the act and deed of the said Robert Guy, their testator; and to this plea attached a notice similar in its terms, if not in words, to the notice attached to the plea in the original suit.

Upon this plea issue was joined, and the cause submitted to a jury.

Upon the trial of the cause the bond, which was the foundation of the original action, was offered in evidence and objected to on account of alleged variance between it and the bond set forth in the *scire facias*. This objection was overruled by the court and the bond read to the jury.

The defendants then offered evidence under their notice, which was objected to and the objection sustained.

A verdict having been rendered for the plaintiffs, the defendants moved for a new trial and assigned the six following reasons:

*1. "The court erred in suffering the bond to be read in [342 evidence."

2. "Certain articles of agreement, referred to in the condition of the bond, were not given in evidence; nor was any evidence offered to prove the terms of that agreement."

3. "No evidence was offered to prove a breach of any of the conditions of the bond," etc.

4. "No evidence was offered of the existence of any such record as that set forth in the *scire facias*."

5. "No evidence was offered of any damage sustained," etc.

6. "The court erred in rejecting the testimony offered under the notice."

The defendants also moved in arrest of judgment, and in support of the motion assigned the five following reasons:

1. "The record shows such a suit or proceeding as is not authorized by the statute."

2. "The *scire facias* does not show that there ever was a judgment to which the defendants in this suit ought to be made parties, or if there ever was such a judgment, where the record is to be found, or that it has not been paid or discharged."

3. "The issue made up is an immaterial issue, or rather no issue at all, and the finding of the jury is a nullity upon which no judgment can be rendered."

4. "The verdict finds nothing but the negative of *non est factum*; it finds no breach of any condition, covenant, or contract, it finds no damages," etc.

5. "There are many other reasons apparent upon the record."

ALLEN and MURPHY, of counsel for the defendants, submitted no arguments in favor of these motions.

BRAZEE, for plaintiffs, insisted that there was no variance between the bond declared upon and the bond given in evidence.

*That the evidence referred to in the second, third, and [343 fourth reasons assigned for a new trial was unnecessary under the issue joined. The only matter by this issue controverted was

whether the deceased Guy executed the bond. The jury could not go out of this issue to inquire as to other matters. What is not denied by the plea is admitted, and a jury can not find against the admissions of the parties in their pleadings. He cited 2 Starkie's Ev. 22, 30. As to the fifth reason, he insisted that the damages had been ascertained in the original action, and could not now be inquired into, the object being to make the defendants parties to a judgment already rendered, not to recover a new judgment.

The court properly rejected the evidence offered by the defendants, because it was not competent to go behind the original judgment, and because the notice is not sufficiently specific.

In resisting the notice in arrest of judgment, he referred to 22 Ohio L. 64, section 69, under which this proceeding was held. He also insisted that it was sufficiently apparent from the record that the original judgment was unsatisfied, etc.

HITCHCOCK, J., delivered the opinion of the court:

Numerous reasons have been assigned in this case, both in support of the motion for a new trial and of the motion in arrest of judgment, and some of them perhaps without much reflection. We will endeavor, however, to dispose of them in the order in which they are presented.

As to the first, the counsel for the defendants having furnished no argument, and having pointed out no particular variance, we are at a loss to conjecture wherein it is supposed to consist. It is true the bond declared on is not in the precise words with the one given in evidence, nor is it necessary that it should be. A variance to be fatal must be material. It must be such as in some measure to change the sense. That is not the case here. Further, it is not necessary for the pleader to set forth an instrument *verbatim*. He may set it forth according to its legal effect, 344] and it will be *sufficient. Such appears to have been the object in the case before the court, and that object has been in our opinion effected. There is then no variance, legally speaking, between the bond declared upon and the one given in evidence, and the court would have erred in excluding the latter from the jury.

The second, third, and fourth reasons for a new trial are founded upon the supposition, not that the verdict is against evi-

dence, but that there was not a sufficiency of evidence to sustain that verdict. Nothing more is necessary to dispose of this part of the case than to ascertain the issue joined between the parties. And it would seem that this is a question which had not been very fully considered by the counsel by whom the motion was made. It is an invariable rule that facts admitted by the pleadings *need* not, nay that they *shall* not be proved. A jury will not be permitted to controvert such facts by their verdict. Again, it is a rule that facts alleged in pleading, and not denied, are admitted, and it would be worse than useless to prove facts which were admitted. If, in the present case, the defendants would have called in question the articles of agreement, they should have done it by an appropriate plea. Not having done so, they have admitted their existence as set forth in the *scire facias*. If they would have relied upon the performance of the conditions of the bond, they should have required oyer, and pleaded that performance. This would have put the plaintiff upon proof to show that these conditions had not been performed, or, rather, the defendants would have taken upon themselves the burden of proving performance. Not having pleaded in this manner, no proof was necessary on either side upon this subject. If they would have denied the existence of the record, it should have been done by the plea of *nul tiel record*. Such a plea would have compelled the production of the record, but without such plea such production was unnecessary. The defendants, however, did not think proper to rely upon any of these pleas. They tendered the plea of *non est factum*, upon which issue was joined. The only question, then, for the jury was to determine whether the bond was or was not the deed of the decedent, Robert Guy. To sustain their action, nothing more was necessary for the plaintiffs, under *this issue, than to [345 introduce the bond itself. This was done, and the jury very properly returned a verdict for the plaintiffs.

Was it necessary for the plaintiffs to introduce evidence of the amount of damages sustained? This is the next question raised. In many cases it may be proper, nay, necessary, to show the amount of damages sustained in consequence of the breach of condition of a bond, in a suit upon that bond. Especially where, as according to our practice, the jury find the amount equitably due. But this is not an ordinary case. It is a proceeding under section 69 of the practice act of February 10, 1824. 22 Ohio L. 64. This

section, among other things, enacts, that "if there be two or more plaintiffs or defendants, and one or more of them shall die, if the cause of action shall survive to the surviving plaintiff or plaintiffs, against the surviving defendant or defendants, the writ or action shall not thereby be abated, but such death being suggested upon the record, the action shall proceed at the suit of the surviving plaintiff or plaintiffs, against the surviving defendant or defendants; and after final judgment, the plaintiff may proceed, by *scire facias*, to make the representatives of the deceased defendant or defendants parties to said judgment and any judgment obtained," etc. The original action, which is the foundation of the one before the court, was instituted in 1823, Robert Guy being then in full life. In that action he, together with others, was a defendant, and pleaded. During the pendency of the suit he died, but the cause of action survived and was prosecuted to final judgment against his co-defendants. That judgment was rendered in 1828, after a trial by jury and assessment of damages. To this judgment, so rendered, the defendants must be made parties, or they must be discharged in this action. No assessment of damages are necessary, because those damages have been already liquidated in the original action. Of course, the evidence referred to, had it been offered, would have been irrelevant. It was unnecessary.

The sixth and last reason assigned for a new trial is, that the court erred in rejecting the testimony offered by the defendants under their notice.

This testimony would have been proper in the defense of 346] *the original action. It was of matter which transpired previous to the commencement of the suit. If we can form any opinion from the pleadings, these matters must have been passed upon and settled in the trial of that suit. True at the time of the trial Robert Guy was not a party. He had previously deceased. He was a party, however, at the time of the plea pleaded, and at that time was equally interested with his co-defendants. Under these circumstances, it would seem to be doubtful how far it would be proper to go again into the examination of these matters in the present case, especially when we take into consideration the before recited provision of the statute. But, let this be as it may, the defendants have another difficulty to contend with.

Section 42 of the practice act, 29 Ohio L. 67, provides: "That

it shall be lawful for the defendant in any action to plead the general issue, and give in evidence any special matter, which, if pleaded, would be a bar to such action, giving notice with the same plea of the matter or matters, so intended to be given in evidence." This is no new provision in our statutes. It was introduced at a very early period, and has been continued until the present time, without any material change. The object of all special pleading is, to arrive at the matter of fact or of law, litigated between the parties, divested of extrinsic circumstances. Special pleading, in its nature, tends to the advancement of justice. Although this is its legitimate effect, yet in consequence of the technicalities, by which it is surrounded, it is sometimes perverted by a more artful to entrap a less skillful pleader. The intention of the legislature, by this provision of the statute, was undoubtedly to supersede the necessity of this technicality. It could not have been designed to deprive either party of the same substantial notice that would have been given by a special plea. Understanding this to be the intention, the court, for many years, has held that a notice of special matter, to be given in evidence, must contain all the substantial precision of a special plea, although divested of its technicality. In other words, that the matter of the notice must be such, that if embodied in a special plea, that plea would be good upon general demurrer. And this we understand to be the course of decision in other states where a similar *statute is in force. To decide otherwise, would en- [347 able a defendant to pervert a statute intended for the advancement of justice to the worst of purposes. It would enable him to conceal his defense until the moment of trial, when it might, and probably would, be beyond the power of the plaintiff to meet it.

The notice, in the case before the court, clearly does not come within this rule. It is general in its terms, and in no shape specific. More peculiarly is it so in that part under which it was claimed to introduce the evidence. That evidence, therefore, was properly rejected.

From all these considerations we are satisfied that the defendants can take nothing by their motion for a new trial, but the same must be overruled.

Shall the judgment be arrested? The first reason assigned why it should be, is "that the record shows such a suit or proceeding as is not authorized by statute." This *scire facias* was issued under

section 69 of the practice act of February 18, 1824 (22 Ohio L. 64), before referred to and cited. The proceedings are in strict conformity with the provisions of that section of the law, both within the letter and spirit.

As to the second reason in arrest, we have only to say that the *scire facias does* show that there "*was* such a judgment" as is contemplated by the before-recited section 69 of the practice act, and if so it shows one to which the defendants "ought to be made parties."

It *does* show that the record of that judgment is in the Supreme Court of the county of Gallia, the court from which the *scire facias* issued; and it shows that this "judgment remained in full force and effect, in no way vacated, reversed, or annulled." Although there is no express allegation that the judgment is "unpaid," there is an equivalent allegation. And were it otherwise the exception, if it be of any validity, should have been taken at an earlier stage of the proceedings. It would be no cause for arresting the judgment.

The next reason assigned for arresting the judgment is, that "the issue made up is an immaterial issue, or rather no issue at all, and the finding of the jury is a nullity, upon which no judgment can be rendered."

348] *If this be so, if there was no issue or an immaterial issue, or if the finding of the jury be a nullity there has been a mistrial, and the court would direct a new trial, order a repleader, or take such other steps as might be necessary to do right and justice between the parties. But let us examine. The *scire facias* sets forth a bond, charging that the same was executed by Robert Guy, the decedent. The defendants, by their plea, deny that Robert Guy executed this bond. Here is a fact alleged by one party and denied by the other. And this I have always supposed constituted an issue. Is this a material issue? As to the proper answer to this question there can be no doubt. Suppose the jury had found that the bond was not the deed of Guy, would not the defendants have been discharged? And if the finding of the issue in their favor would have been thus material to them, is it not equally material when found against them? If the issue be material, then the finding of the jury is not a nullity. And I apprehend the court will have no difficulty in rendering such a judgment as is contemplated by the statute.

The fourth reason assigned is, "that the verdict finds nothing but the negative of *non est factum*," etc.

This was all that it was necessary to find. The jury having found this, have found all submitted to them by the issue. It would have been improper for them to have inquired as to the "breach of any condition, covenant, or contract." No such thing was in controversy before them. Nor was it necessary that any "damages" should be assessed. These damages had been assessed in the original suit. Having found the "negative of *non est factum*," the law declares the consequence. And that consequence is, the defendants shall be made parties in the judgment in that original suit."

What those "other reasons, *apparent* upon the record" are, according to the fifth assignment, we are not informed. Upon examination of the record we discover none; and as counsel have not pointed them out, it is, perhaps, but reasonable to conclude that they do not, in fact, exist.

The exceptions in arrest are not well taken, and judgment will be entered on the verdict.

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*Henry Newman v. Robert McGregor. [349

Work performed upon a special contract, not exactly according to its terms, and accepted, or assented to, compensation may be recovered in the common courts. So where payment was to be made in specific articles as is not.

Writ of error to the court of common pleas of Richland county, adjourned for decision from that county. The plaintiff below declared in the common counts in assumpsit for work and labor, for goods sold, and for money lent, paid, and had and received. Issue was taken upon *non assumpsit*, and a notice of set-off. On trial the bill of exceptions shows that the "plaintiff adduced in evidence a book account, containing an item for the clearing of land, and proved by several witnesses that he had nearly cleared the ground, proved that they were at the rolling of the logs, that the defendant then said that the reason why the rolling was had at so early a stage of the work, was that the plaintiff was going to re-

move from his house, and that plaintiff's wife could not then cook for the hands; defendant had no family. Defendant then proved that the plaintiff had contracted with the defendant to clear for him some land, not less than three acres, at the rate of three dollars per acre, to be paid for in wheat at fifty cents per bushel, and that the defendant himself finished the clearing of the land. Plaintiff proved that defendant told the witness that plaintiff had sent him his account, and that it was unjust, but that he owed the plaintiff something. Defendant set off his book account against plaintiff's demands.

"At the hearing, the defendant requested the court to direct the jury that if they found that there was a special contract for the clearing of this land at a given price, and that the land was not cleared accordingly, that *defendant* could not recover on that item, and that if they found that there was a contract for the clearing of this land, and that it was to be paid for in wheat, that whether the contract of plaintiff was performed or not, that plaintiff could not recover under the state of the pleadings.

"The court thereupon directed the jury that if from the evidence the jury believed there was a special contract, yet if the same had been waived by the parties, or had been completed substantially, would justify them in allowing the plaintiff the actual value of his 350] labor, though the contract *was special in case it was to be paid in wheat, yet if the plaintiff had proved that this bill was sent to defendant and that demand was made, that a recovery might be had in this form of action, even on a contract for the payment of wheat, and that upon the whole they submitted to the jury the subject matter of this said item for clearing.

"To which opinion of the court, so given in charge to the jury, the defendant excepts, and prays the court to seal this, his bill of exceptions.

"D. HIGGINS, *Pres't.* [L. S.]
WM. PATTERSON, [L. S.]
ISAAC OSBURN." [L. S.]

There was a verdict and judgment for the plaintiff for the value of the work done in clearing, to reverse which this writ is brought. Two errors are assigned:

"1. That the court erred in directing the jury that they submitted the subject matter of the said item for clearing to their consideration.

"2. That the court erred in directing the jury that if there was a special contract for the payment of this item in wheat, and the plaintiff made a demand of the same previously to bringing the suit, that the plaintiff could recover the same in this form of pleading."

COFFINBURY, for plaintiff in error, cited 2 Stark. 251.

No argument was submitted for the defendant in error.

Judge WRIGHT delivered the opinion of the court:

Neither the evidence offered, nor the charge of the court, nor the matter excepted to, are very clearly set forth in the bill of exceptions. It is difficult to discover the real matter in controversy. We think, however, the bill of exceptions shows there was a contract for clearing not less than three acres of land, at three dollars an acre, to be paid in wheat at fifty cents a bushel; and that the log rolling was brought on before the work was done, by defendant's permission, because the plaintiff's wife was about to remove and could not cook for the hands, if not had then; and that the defendant below afterward finished the clearing himself, *and [351 refused to pay the plaintiff's bill when presented because it was unjust, admitting at the same time that he owed something; and that on the trial he set off his own book account against the claim for clearing. The bill does not show what else was proven, or that nothing else was proven. The court charged the jury that if there was a special contract which had been *waived* by the parties, or had been *substantially completed*, the plaintiff might recover, on the common count, the actual value of his labor; and if the labor was to be paid in wheat, the plaintiff might recover if before suit he had sent in his bill and demanded the wheat; and the court submitted the whole item for clearing to the jury upon that charge. The verdict upon the item was probably insufficient to pay the clerk for the record appended to the writ of error. The case is emphatically a small business, yet being before us we must decide it.

1. Did the court err in saying to the jury they submitted the whole item to them upon the charge? Counsel say there is so much confusion in the authorities on both the questions raised that he forbears to cite any but 2 Stark. 251, which he cites, "because it is a late decision and a strong case in favor of" his posi-

tion. In Therogood v. Clark, 2 Stark. 251, it was held that where the drawer of a bill, payable to his own order, settled with the acceptor after the bill became due and gave him a receipt in full, and took up the bill and afterward indorsed it, the indorser could not maintain his action against the acceptors. There is probably some mistake in the reference. If this case is a strong one in favor of the position of the plaintiff in error, we do not perceive its bearing, nor can we discover the error complained of.

2. Did the court err in charging the jury that if there was a special contract which had been *waived* by the parties, or had been substantially *performed*, the plaintiff might recover the actual value of his labor on the common counts? Where there is a *subsisting* special contract, the party suing for a breach must declare upon it; but where work has been done under a special contract, though not in accordance with its terms, which has been accepted by the other party, or has benefited him, a recovery may 352] be had on the common *counts for what the labor is really worth; and the defendant may, in such case, show the contract, if he chooses, to limit the damage to be recovered. So a recovery may be had on the common counts where a special contract existed, but has been waived, or put an end to, or performed, or where the plaintiff has been prevented, by the defendant, from doing the work. 1 Chit. Pl. 333; 7 Cranch, 303; Bull. N. P. 139; 7 Johns. 132; 10 Johns. 37; 7 Term, 181; 1 New R. 351, 357; 12 Johns. 274; 5 Johns. 87; 2 Mass. 415; Pow. on C. 417; Doug. 651; 5 Mass. 39, 391; 1 Mass. 355; 11 Wheat. 250, 251; 1 Cowen, 46; 1 Ohio, 355, 363; 15 Johns. 476; 4 Ohio, 357. The charge of the court was substantially correct, and is sustained by authority. If the party for whose benefit work has been done, under a special contract, waive its exact performance, or discharge the other party from completing it, does that confer upon him the legal right to avail himself of the labor without making compensation for it? We think such an assumption contrary to equity and good conscience. What benefit can result from a *count* on the special contract except an increased chance of avoiding payment by reliance upon technical defect? The recovery in either form of action would bar a subsequent recovery for the same cause of action in any form.

The objection urged that the stipulation to pay for the labor in wheat would prevent a recovery on the common counts, is not

well founded. We do not see what material difference that makes in the question. If one does work for or sells goods to another, and agrees to receive his pay at a stipulated time in wheat, shoes, or any other article, or in labor, and the articles are not delivered, or the work done according to the stipulation, the neglect or omission changes the contract into one for money, and the party to whom the payment was to be made is no longer bound to receive the goods or labor, but may demand money, and recover it on the common count in assumpsit for goods sold. It is the usual course of shop-keepers, who deal on credit, to receive trade in pay for goods, deliverable at a future day. In case the trade is not delivered, and suit is brought for the goods, it is the universal practice to count for goods sold, not upon the *special contract [353 to receive trade and the refusal. This practice is convenient, and, we think, conformable to strict law and justice. We do not feel disposed to alter it.

The judgment of the court of common pleas affirmed with costs.

STEPHEN HORSEY *v.* A. HEATH, JR., AND E. LITTLER'S ADMINISTRATORS.

Where one of two partners is deceased, and the other insolvent, a surety for the firm, having paid the debt, may proceed in equity against the estate of the deceased partner, without prosecuitng a suit against the survivor.

IN chancery, adjourned from Pickaway county. The bill sets forth that in 1818, Littler and Heath entered into partnership in the purchase and disposition of a drove of cattle, and, to prosecute the business, borrowed, upon their joint note, two thousand two hundred dollars, of the Bank of the United States, at Chillicothe. The complainant and several others indorsed said note upon the credit of both the drawers. The note was renewed and continued at the bank, from time to time, till September, 1819. Heath transacted the business, procured the indorsements, etc. The three first notes had the names of both Littler and Heath affixed to them—the others, that of Heath alone; but the complainant indorsed, relying upon the responsibility of both, and under

the assurance from Heath that all were to sign the paper. Suit was brought on the last note against Heath, by the complainant and the other indorsers, under the statute of Ohio, and judgment recovered in 1820. Heath and the other indorsers became wholly insolvent, and complainant has been compelled to satisfy the judgment; he prays that the estate of Littler may be charged with the amount.

Heath having absconded, the bill, as to him, is taken *pro confesso*. The administrator of Littler, in his answer, disclaiming all knowledge of the transaction, denies the complainant's right to proceed against him in this court, requires proof of the allegations in the bill, and submits whether, in any event, he shall 354] be compelled to pay to complainant more *than a *pro rata* dividend of the unadministered assets, without reference to those administered before notice of the complainant's claim.

There is a general replication, and proof taken and filed in the case.

DANA and DOANE, for complainants, cite 1 Caine's Cases in Er. 40, 56; 2 Johns. Ch. 339, 369, 508; 4 Johns. Ch. 123; 2 Har. & Gill, 305; 2 Ves. jr. 101, 571; 3 Ves. jr. 277, 399, 560; 5 Am. Dig. 103; 1 Mer. 539, 572, 72; 2 Vern. 277, 292; 1 P. Wms. 682; 4 Des. 148; 2 Big. Dig. 418, art. 66–68, 70; 1 Salk. 126; 1 Wend. 457; Wat. on Part. 196, 376, 385; 1 Esp. N. P. 118, 141; 1 Chit. on Pl. 37; 1 Ohio, 127; 1 Murph. 410; 1 Lit. 305; 5 Burr. 2613; 2 Blk. 696; Gow on P. 258, 259; 1 Conn. 356; 1 Hay. 221; 2 Bay, 533; 2 Pet. 199; 15 Ves. 227; 2 Barn. & Ald. 210.

OLDS and HUNTER, contra, 1 McC. 16, 82, 388; 2 Johns. 300; 4 Johns. 224; 10 East, 481; 1 Camp. 281; 4 Esp. 89; 4 Wash. C. C. 98, 271; 2 Day, 272; 15 East, 7; 3 Pick. 179; 2 McC. 379; 3 P. Wms. 408; 3 Esp. 248.

WRIGHT, J., delivered the opinion of the court:

It is not necessary to recapitulate the evidence in this case. It satisfies us that Heath and Littler were jointly concerned in the drove of cattle purchased, and that the money was borrowed at the bank on their joint responsibility, and for their joint use and benefit, and also that the superior credit and responsibility of Littler was the security most relied upon by the indorsers in lending

their names to the paper. That Heath was the active partner, made the purchases, procured the indorsements, some upon blanks, with the assurance that all the names were to be to the notes, and that Littler himself, after he found his name was left off the note, complained that Heath was acting the rascal in leaving his name off with intent to cheat him out of his share of the proceeds of the cattle. That the renewals of the note in bank were in order to conform to the course of business in the bank, *but was in [355 fact, and so understood by all the parties, only a continuance of the original loan to the partnership. That the complainant, as security for Heath and Littler, has been compelled to pay money, and that Heath, the survivor, has absconded to parts without the state, and is wholly insolvent.

Upon this state of the case, no good objection to the complainant's coming upon the estate of Littler is perceived. It is urged that he is bound to pursue the surviving partner, and prosecute at law, to insolvency. We know of no rule in equity which requires of a security the pursuit of claim upon the partnership against the survivor to judgment, when that survivor is insolvent, has absconded from the country, and it is evident such pursuit would be fruitless. The complainant became bound for Littler as well as Heath, and has been compelled, in consequence, to pay money. Both were equally liable to him, and at law, as well as on the plainest principles of justice, he has a right to proceed against both until made whole, and to recover from either or both. Where one of several who are jointly liable dies, leaving a solvent survivor, for good reason the law requires the pursuit of the survivor before you resort to the estate of the deceased; but the insolvency of the survivor, in our opinion, would exonerate the security from such pursuit, for the simple reason that the sole object and end of such pursuit, the obtaining satisfaction, is put beyond attainment by the insolvency; and neither law nor equity requires a vain thing. This would hold even if the survivor were within the jurisdiction of the court, and could be reached and coerced by legal process; and by much stronger and more equitable reasons shall the security be held discharged from the pursuit of an insolvent partner into another jurisdiction, when there is a solvent estate of the deceased partner within the jurisdiction that can be reached. Justice would seem to require of those representing the estate of the deceased partner in such cases, to apply the effects of the de-

ceased, which may have been increased by the very money which the security has been compelled to advance, to make the security whole, and themselves encounter the trouble and expense of pursuit after the copartner liable to contribution. Those having the benefit should first meet the responsibility, and take the chance of 356] recovery from *those participating with them, and not throw both upon one having no benefit, and who merely lent his name to oblige the deceased, as well as the survivor. We think that a security, in such a case, may charge an intestate estate in this court.

But it is said the partnership between Littler and Heath was limited, and was dissolved, and that the complainant knowing the dissolution, became security for Heath alone. The partnership was, indeed, limited in its subjects, the dealing in cattle and the procuring the means of attaining stock, but as to those subjects it had all the incidents of a general partnership. If dissolved, that fact must have been known to the respondents, and they are bound to prove it. There is not only no evidence of that fact, but there is, on the contrary, the declaration of Littler in effect, that it was not dissolved, and that his name had been left off the note by his own partner with intent to defraud him! The fact of dissolution, and the proof of notice of it to the complainant, are very different things. If the dissolution were known, then resort might be had to circumstances to establish a knowledge of it in the complainant; but it is not admissible for Littler's representatives, against the declarations of their intestate, wholly to omit proof of the principal facts, and deduce it from the act of the copartner in having a separate note, and of the complainant in indorsing it, when the intestate proclaims the act of his partner to have been done in fraud of his own rights, and the proof and circumstances show, either that the complainant did not notice the change, or, having noticed it, was lulled to quiet by the assurance of Heath that all were to sign. If, as claimed, this was a limited partnership, and was dissolved, would that put an end to the joint validity of the partner for their partnership debts. The fact of notice would not affect the question. No *new debt* was created at bank. The old one remained outstanding, although, to conform to the custom of business in the bank, when continued and further time was given, the evidence of the debt was, from time to time, changed. This was perfectly understood by all the parties. No

one ever, in fact, paid the debt but the complainant. Though partnerships may be terminated, either by limitation of time or *the completion of the business which was its subject, yet [357 as to partnership responsibilities they continue until all are discharged. The proposition of the respondent would be a great convenience to debtors, as it would put it in their own power, without the consent of creditors, to discharge their obligations by a mere dissolution of partnership. But this partnership, on the evidence, continued *more than a year*. The loan was obtained in April, 1818, and the last note for it was discounted in July, 1819, but a short time over a year; and if the question were one to be affected by dissolution, or expiration of time, proof would be required of the allegations relied on. The assumption is not well founded in the case, that the complainant consented to a change of the paper, knowing the partnership at an end, and thus gave credit to Heath alone, and discharged Littler. There is no evidence that such was the case, but there is evidence to the contrary. When the identity of the debt is ascertained, it is now settled that a new change of the evidence of it will not affect the liability of the real parties, in a court of chancery.

Upon the whole, this case, stripped of technicalities and words, is a very simple one. Horsey became security for Heath and Littler, and had to pay the money for them; Heath being insolvent, has run away; Littler is dead, but has left a solvent estate; and Horsey now asks to have his claim admitted as a valid one upon the estate of Littler. It appears to us a clear case for relief against Littler. But, inasmuch as we are not fully advised of all the facts necessary to a final decree, we refer the case to a master, with directions to take and state:

1. The account paid by the complainant, on account of the loan of the bank, with interest up to the first day of the next term.

2. The time when the administrator of Littler had notice of the complainant's claims.

3. The value of the assets, real and personal, of the intestate, which have or may come into the hands of the administrator.

*4. The claims upon these assets, showing in distinct [358 items those by law preferred to creditors.

5. The amount of disbursements made by the administrator, and the time each was made.

STATE OF OHIO, EX REL. URIAH LOOMIS, *v.* LEMUEL MOFFITT.

January, 1831, there was an election for an associate judge for the county of Ashtabula. The journal of the house certified the election of *Samuel* Moffitt—that of the senate the election of *Lemuel* Moffitt. The two houses did not correct and reconcile this discrepancy. The speakers did not sign the certificate of election to the governor, required by law, and no commission issued. The court of common pleas of Ashtabula county admitted *Lemuel* Moffitt to take the oath of office and sit as an associate judge: Held, that this was illegal, and that *Lemuel* Moffitt could not, upon such state of case, be inducted into office.

THIS case was reserved in the county of Ashtabula. It is as follows: At the September term, 1831, of the Supreme Court for Ashtabula county, Uriah Loomis filed a complaint, accompanied by affidavit, in said court, setting forth that one Lemuel Moffitt, of said county, from the 23d day of May the next preceding, and until the then present time, assumed to hold and exercise the office of associate judge of the court of common pleas for said county, and had in fact exercised the powers and duties of said office, without having been elected and commissioned as is provided by the constitution and laws of the State of Ohio, and praying for a writ of *quo warranto*, to issue to the said Moffitt, requiring him to appear and show by what authority or warrant he had exercised, and continues to exercise, the duties of said office.

Upon this complaint, a rule was entered upon Moffitt to appear and show cause by the first day of the then next term of the court.

In pursuance of, and in obedience to, this rule, the defendant, at the August term, 1832, appeared, and for cause showed, that, on January 22, 1831, he was, by joint ballot of the senate and house of representatives of the State of Ohio, elected an associate judge of the court of common pleas for the county of Ashtabula, and that on the 23d day of May, of the same year, he was sworn into office.

359] *Evidence was introduced and is on file as follows, to wit:

1. An extract from the journal of the house of representatives for the session of 1830–31, from which it appears that on the 22d day of January, of the latter year, Samuel Moffitt was elected an associate judge for the county of Ashtabula.

2. An extract from the journal of the senate of the same day showing that Lemuel Moffitt was elected to the same office.

3. Depositions from several of the members and officers of the general assembly, to prove that Lemuel not Samuel Moffitt, was the individual voted for and elected.

4. An extract from the minute book of the court of common pleas for Ashtabula county, from which it appears that on May 23, 1823, Lemuel Moffitt appeared in open court and took an oath of office as an associate judge for Ashtabula county, the form of which oath is entered on the minute book or journal, and conforms to the oath prescribed by statute for associate judges.

PEASE and WEBB, for the relator:

The question presented in this case is simply, what is the proper and legal evidence which will justify a person in exercising the office of associate judge. We insist that nothing less than a commission under the great seal, with a certificate that the necessary oaths have been taken, is adequate. 29 Ohio L. 407, 409. No other evidence can with propriety be admitted. The testimony on file in this case is irrelevant. Although associate judges are elected by joint ballot of the senate and house of representatives, yet the evidence that a man has been elected is contained in a certificate, signed by the speakers of the two houses, and in a commission, issued in pursuance of such certificate, signed by the governor, countersigned by the secretary of state, with the great seal of the state affixed. Resort can not be had to the parol evidence of the members of the legislature, to prove the fact of election.

*GIDDINGS and WADE, for the defendant: [360

The constitution of Ohio, article 3, section 8, vests the appointment of judicial officers in the two houses of the general assembly. Neither the judicial nor executive branches of the government have any participation in it, except when a vacancy happens during the recess of the legislature, in which event the governor can make a *pro tem.* appointment. These officers are to be elected by joint ballot. The appointment is complete when an individual is declared, by the speaker of the senate, in the convention of the two houses, to have been elected.

From that instant the privilege of holding the office becomes a

vested right, in the individual elected, because the appointment is *perfect* and completely *consummated*, by a *public act*. No further act remains to be done by the appointing power. Marbury *v.* Madison, 1 Cranch, 137. No mistake of a clerk, no neglect of the speakers to sign a joint certificate, no denial of the governor to sign a commission, could deprive the person elected of his vested right to exercise the office.

It is a mistaken notion that a commission is necessary to justify an associate judge in discharging the duties of that office. A commission is neither required by the constitution nor the law, except in cases of appointments made by the governor to fill vacancies.

The evidence in this case is clear, that the defendant, Lemuel Moffitt, was elected an associate judge for Ashtabula county, that he was declared by the speaker of the senate to be so elected, and that he has taken the necessary oath of office. He has therefore a constitutional and legal right to exercise that office.

But admitting it were otherwise, still the proceedings in this case are not such as to justify the interference of the court. The application is for a writ of *quo warranto*. It is not made by the prosecuting attorney, but by a private individual. On this account the rule should be discharged.

Judge HITCHCOCK delivered the opinion of the court:

361] *This case is one of no ordinary importance, inasmuch as its decision calls for an exposition of the constitution itself, and also for an examination into the constitutionality of some of the laws purporting to be made under that constitution. Section 8, of article 3, of the constitution provides that, "The judges of the Supreme Court, the president, and the associate judges of the court of common pleas shall be appointed by joint ballot of both houses of the general assembly, and shall hold their offices for the term of seven years, if so long they behave well." Although this power of appointment is vested in both houses of the general assembly, still the constitution has not prescribed the particular manner in which it shall be exercised, except that it shall be by "*joint ballot*." This is left *to be* regulated by the legislative authority, and *is* regulated by the joint rules of the two houses. They meet in convention, with their speakers and clerks, the speaker of the senate presiding. The ballots are collected and counted, each clerk keeping a separate check-book; and when any individual is found

to have a majority of all the votes given, that individual is declared by the speaker of the senate to be duly elected to the office to be filled. An individual thus elected has a right to the office, and can not be deprived of that right, except in the mode pointed out in the constitution. He can not be deprived of it by the mistake of the clerks, for such mistake would be corrected by the bodies by whom they are appointed. He can not be deprived of it by the neglect of the speakers; they are the organs of the different houses, and should they neglect any duty its performance would be enforced by that branch of the legislature over which they preside. Besides all this, "An act to provide for commissioning certain officers" (29 Ohio L. 409) contains this proviso, "That the election of all officers elected or appointed by the legislature shall be certified by the speakers of both houses." Should the two speakers refuse to sign such certificate (a circumstance by no means probable), power is vested in this court to compel them to do it. By section 3 of the practice act, 29 Ohio L. 56, the Supreme Court is authorized to issue a *mandamus* in proper cases. And in case of such refusal, this would be undoubtedly a competent and proper remedy.

*The act before referred to (29 Ohio L. 409) enacts, "That [362 each judge of the Supreme Court, president, and associate judges of the court of common pleas, sheriff, coroner, auditor, state treasurer, militia officer, and justice of the peace, and every officer whose office is created by law, and not otherwise provided for, shall be entitled to receive from the governor a commission to fill such office upon producing to the secretary of state a *legal certificate* of his being duly elected or appointed." This "*legal certificate*," in case of an officer elected or appointed by the general assembly, is a certificate signed by the speakers of both houses. Upon the production of such certificate, the governor will issue a commission. Should he refuse, he is within the reach of the same writ of *mandamus*. The governor of Ohio is no less answerable to the operation of law than the most humble citizen. And it is to be hoped that no citizen will ever fill that important office who entertains a different sentiment.

Here, then, ample provision is made whereby the rights of any officer, whose appointment is by the constitution vested in the general assembly, may be secured. He is elected by joint ballot of the two houses, met in convention. His election is declared by

the presiding officer. If any mistake occurs, it can be corrected at once. Journals are kept of all the proceedings from day to day, and these journals are read in each house every morning. Here is another opportunity to correct any mistake which may have crept in, through accident or design, in the proceedings of the next preceding day. Or should a mistake be discovered at any time during the session, it might still be corrected. If the individual be declared by the speaker of the senate to be elected, he is entitled to a certificate. If this be withheld, upon application to the general assembly he might compel its signature; or if he should fail here, authority is vested in this court to grant redress in the manner before referred to.

Upon the production of this certificate the governor will issue a commission; without it he does not possess the power.

In the case before the court the evidence is such as to induce a belief that the defendant, Lemuel Moffitt, was elected, at the 363] time by him stated, an associate judge. At least *the evidence is such as would have been, in all probability, sufficient to establish this fact, had it been exhibited to the proper tribunal at the proper time and place. If when the journals of the house of representatives were read, on January 23, 1831, this evidence had been exhibited, there can be no doubt that that house would have ordered the correction of their journal, so that it would have appeared that the defendant *Lemuel* Moffitt, instead of *Samuel* Moffitt, had been, on the day preceding, elected an associate judge. If a mistake had been introduced, this was the appropriate time for its correction.

But whether this be the appropriate evidence to prove, before a judicial tribunal, the fact of an election, by the two houses of the general assembly, is a more serious question. In section 9 and article 1 of the constitution, it is required that "each house shall keep a journal of its proceedings, and publish them." This journal, when taken in connection with the laws and resolutions, would seem to be the appropriate evidence of legislative action. It is not the action of a single member of the legislature of which I speak, but of the whole body of the "*general assembly.*" The former might with propriety be proven by parol testimony, but the latter is evidenced by evidence of a higher nature. The testimony of an individual member could not be received to contradict a statute, and if not, why receive it to contradict an entry upon

the journal? Besides, the principle that an election might be proven by parol, would be fraught with danger. Where is the man, who has been for years a member of the legislature, possessed of a memory so tenacious, that he can undertake to state the names of the individuals for whom he has given votes for the office of associate judge, or for other offices? I presume he can not be found.

But suppose this evidence is competent, even before a judicial tribunal, is it sufficient to justify the defendant? Giving it the greatest latitude contended for by his counsel, it amounts to no more than this, that he was elected an associate judge and that he took the oath of office. It is not pretended that a certificate of this election was ever signed by the two speakers, or that he ever received a commission. In fact the ground assumed is, that a commission is *unnecessary. It may be well to refer to [364 the several statutes which are connected with this subject.

The "act declaring offices vacant in certain cases, and to provide for filing the same," passed January 25, 1813, 29 Ohio L. 407, contains this provision, in section 1, "Every commission that may be hereafter issued by the governor, to any judge of the Supreme Court, president or associate judge of either of the courts of common pleas, shall be transmitted by the secretary of state to the clerk of the court of common pleas of the county wherein such judge may reside; and it is hereby made the duty of the clerk to receive and transmit the same to the person entitled thereto; whereupon such person, having received such commission, shall take the oath required by the constitution and laws of this state, and transmit a certificate thereof to the same clerk, signed by the officer administering such oath or affirmation, within twenty days after he shall have received such commission.

In section 2 of the same act it is provided that if a certificate as aforesaid is not transmitted to the clerk within the said twenty days, the person entitled to the commission shall be deemed to have refused to accept the office, and the same be considered as vacant. This law prescribes the mode in which a person elected to an office shall signify his acceptance. And it will be apparent, at first blush, that some provision of this kind is necessary; otherwise there might be no individual, for a time at least, to fill an important station.

Next in order comes the statute "to provide for commissioning

certain officers," passed February 26, 1816. 26 Ohio L. 409. This statute has already been referred to, and it is unnecessary here to say more than that it contemplates that all the officers therein named shall be commissioned.

I will next refer to section 5 of the "act to organize the judicial courts," enacted March 18, 1831. 29 Ohio L. 57. The provision in this section is explicit, "that the judges of the Supreme Court and presidents and *associate* judges of the court of common pleas, before they proceed to execute the duties of their [365] *respective offices, shall each take an oath or affirmation to administer justice without respect to persons, and to do equal right to the poor and to the rich, and faithfully and impartially to discharge and perform all the duties incumbent on him as a judge, according to the best of his abilities and understanding, agreeably to the constitution and laws of this state, *and have the some indorsed on his commission.*"

Now taking all these statutes together I draw from them these inferences: that every man before he presumes to exercise the office of a judge must have a commission, must signify his acceptance of the appointment, and must take an oath of office, and have the same "*indorsed on his commission.*" By taking the oath he signifies his acceptance, but he is expressly prohibited from discharging the duty until the "*indorsement*" is made. This may be considered as a mere trifle, as useless formality. But shall a man who assumes the character of a judge treat any part of the law as insignificant and trivial? It would rather become him to be scrupulously exact in his compliance with every *scintilla* of law. Let others, if they will, complain of the unnecessary provision of any statute or of any other principle of law, but such language does not become a judge. Let me not be misunderstood; it is not the commission issued in pursuance of these statutes which confers the right upon the officer. The right is derived from the election or appointment, of which the commission is only evidence. But it is evidence without which the officer can not proceed to act officially.

It would seem, upon an examination of these statutes, that there must be an end of the question before the court, so far as it respects the right of the defendant to exercise the duties of the office which he has assumed, there being no evidence that he was ever commissioned, or even that it was ever certified by the

speakers of the two houses that he had been elected. This court believe a commission to be the only evidence of the right, unless it be shown that these several statutes are a violation of the constitution.

This, although not expressly alleged, seems to be insinuated by the counsel for the defendant. But with what particular part of that instrument they interfere is not suggested. Upon examination of the constitution it will be *found that there is no [366 express provision that any officer shall be commissioned, except in case where a vacancy happens, during the recess of the legislature, in any office the power to fill which is by the constitution vested in the general assembly. In such case, the governor is authorized, by section 8 of article 2, to fill such vacancy by granting a commission, the commission to expire at the end of the next session of the legislature. But that it was intended that commissions should be issued is sufficiently apparent from other parts of the constitution. Section 15 of the same article is as follows: "All grants and *commissions* shall be in the name and by authority of the State of Ohio, sealed with the seal, signed by the governor, and countersigned by the secretary of state." In article 5, reference is had to *commissioned* officers. Had these clauses been omitted, still the court can not doubt but these laws would have been constitutional. A law authorizing any other body than the general assembly to appoint a judge for the term of seven years, or for any period of time beyond the close of the next session of the legislature, would infringe the constitution. Because this power is by that instrument expressly delegated to that body. The constitution, however, has not prescribed the *form* of the oath of office; the legislature, therefore, might prescribe it, not being prohibited. Neither does the constitution describe the evidence which shall exist that an individual has been appointed to an office. The legislature have done it by providing that evidence shall exist in a commission executed according to the form of the constitution. We see no usurpation of power in all this, but a course of legislation which tends to the convenience and well being of the community. The constitution provides, article 8, section 1, that sheriffs and coroners shall be elected by the citizens of the several counties, and goes no further. Are the laws, therefore, which require that these officers shall be

commissioned, that they shall give bonds and take oaths of office, unconstitutional? It can not be successfully contended.

To sustain the right of the defendant in his case, his counsel rely on the case of Marbury *v.* Madison, 1 Cranch, 137. It will be 367] found, however, that that case is not analogous to *the present. Mr. Marbury had been appointed justice of the peace for the District of Columbia, by the President of the United States, by and with the advice and consent of the senate. A commission witnessing that appointment had been signed by the President, countersigned by the secretary of state, and sealed with the great seal of the United States; and was deposited in the office of the secretary of state. The case before the court was an application for a *mandamus* to compel Mr. Madison to deliver over this commission. The court held that the appointment was complete, that the applicant had a vested right in the office, and was entitled to the commission; but they discharged the rule because they had not jurisdiction of the case.

Had this case been an application, on the part of Mr. Moffitt, for a *mandamus* to the speakers of the two houses, to compel them to sign the certificate of his election, or the governor to compel him to sign a commission, it would have been somewhat analogous to the case in Cranch, but now it is not. Mr. Moffitt has assumed to act without a commission and in contravention of the law. Under these circumstances, it is clearly the opinion of the court that he has acted without authority, and that he has not, so far as appears from any evidence now before us, any right to exercise the office of associate judge for Ashtabula county.

To decide otherwise would involve the community in great difficulty. Almost every officer in this state is elected by the legislature, or by the people, and the laws have made ample provision for the evidence with which the individual elected shall be furnished of his election. If these laws were to be disregarded, and the fact of the election should be left to be proven by the frail memory of the electors, it is not possible to conceive of the confusion which would follow. Still this is substantially the principle which we are urged to adopt, and which we must adopt, in order to justify the course pursued by the defendant. We can not do it.

It is objected, for the defendant, that the case is not properly before the court. Writs of *quo warranto* have been issued by this

court; or rather rules to show cause why such writs should not issue have been granted. Still no course of practice has been, until last year, settled by the court. It is *matter of regret [368 that the legislature have not acted upon the subject, prescribing the course of proceeding and settling the law.

In the case before the court, the application for the writ is made by a private individual. In the case of the Bank of Mount Pleasant, decided at the last term, 5 Ohio, 249, it was ruled that an application for a writ of *quo warranto* against a corporation should be made by the prosecuting attorney of the proper county, unless otherwise ordered by the court. The same reason operates where the writ is to issue against an individual as against a corporation. According to the authority of that case, the proceedings in the case before the court are irregular, and the application must be dismissed at the costs of the applicant.

LESSEE OF ANDREW CARLISLE *v.* NICHOLAS LONGWORTH.

A deed from the county auditor, for lands sold for taxes, can not be received in evidence, without transcripts of the various records of the proceedings upon which the sale was founded.

RESERVED in the county of Ross, upon a motion for a new trial.

The action is ejectment for recovery of a part of in-lot number nineteen in the town of Chillicothe.

On the trial to the jury, the only evidence, on the part of the plaintiff, was a deed executed by John McLean, auditor of Ross county, conveying to the plaintiff the premises in controversy. The deed was dated February 22, 1831, and is predicated, as appears from its face, upon a sale of the land for taxes, which sale was made on December 29, 1828. To the reception of this deed without some other evidence to show the sale of the land, the counsel for the defendant objected. But upon this question, the court being divided in opinion, the deed went to the jury. No further evidence being offered by either party, the jury were instructed that the deed was *prima facia* evidence of *title in [369

the plaintiff, and being uncontradicted, they were bound to return a verdict for the plaintiff.

This was accordingly done, and the defendant moved for a new trial: 1. Because the court erred in admitting the deed as evidence. 2. Because the court erred in instructing the jury that the plaintiff was entitled to recover upon the exhibition of the deed alone, without further evidence of the sale of the lands, etc.

BRUSH, in favor of the motion:

Urged that tax sales were not to be viewed by the court with a more favorable eye than was required by the statute. In other words, that the several statutes authorizing the sale of lands for taxes, should be construed strictly, and that the officers acting under those statutes should be held to strict compliance with both their letter and spirit.

He further insisted that under the act of February 1, 1825, 23 Ohio L. 89, "to amend the act entitled 'an act defining the duties of county auditor,'" although it was declared that the auditor's deed should be *prima facia* evidence of title, still it could not be such evidence unless made in pursuance of that act. That it had been thus made it was incumbent upon the party claiming title under such deed to show. To hold otherwise would be reversing the rules of evidence. Instead of holding one party to prove the affirmative of a fact, it would be calling upon an opposite party to prove a negative.

It never could have been the intention of the legislature to give greater effect to a deed made by a county auditor than to one made by a sheriff. A party claiming under a sheriff's deed must show a judgment, execution, levy, and sale. So, a party claiming under an auditor's deed, must show a tax delinquency for non-payment, and sale. These are all matters of record, and can be as easily proven as the existence of a judgment. At least they are matters of record if the county auditor does his duty, for by the statute he is bound to record them.

The decision of the court upon the circuit establishes the prin-
370] ciple that a deed made by a person styling himself *county auditor, and who actually is such, is *prima facie* evidence of title, whether or not there has been a tax sale—a principle unsound and dangerous.

DOUGLASS, in opposition to the motion:

Insisted that, under the law of 1825, the auditor's deed was "*prima facie* evidence of title," and uncontradicted must be conclusive. That the language made use of by the legislature, in section 9 of this act, was clear and explicit, and ought not to be construed away to favor those who had not contributed to the public burdens. He insisted that it was manifest that the legislature had intended to secure to the purchaser at tax sales a title; and that they had been more explicit in consequence of the doubts which had heretofore prevailed with respect to these titles and the many decisions of the courts against them.

He then went into a critical examination of the several laws upon the subject of the sales of lands for taxes, pointing out the defects of the more ancient, and the remedies applied by the more modern statutes. He compared the statutes relating to auditors and sheriffs' deeds, and insisted that the former had the preference, because they were evidence of *title*, while the latter were only evidence of the *legality of sale.*

As to the danger to be apprehended from admitting the auditor's deed, unaccompanied by other evidence, it was imaginary. The only question in fact was, whether this evidence should be introduced by a plaintiff or defendant.

Judge HITCHCOCK delivered the opinion of the court:

The only question for the consideration of the court in this case is, whether under the "act to amend the act entitled an act defining the duties of county auditor," the deed of the auditor, purporting to be executed in his official capacity, is, *of itself, prima facie* evidence of title. And its decision must depend upon a sound construction of that act. In giving this construction, I trust we shall not be influenced by any private feeling upon the subject of the sale of lands for *taxes—a feeling which, it [371 would seem to be insinuated by the counsel for the plaintiff, has heretofore operated too much in our courts. In fact, we have no feeling of antipathy to such sales. It is right and proper that every man who has property to be protected by the government should contribute toward the support of the government, and if he will not do it without, it is right and proper that his property should be disposed of for this purpose. Further, it is for the interest of all concerned that tax sales should be sustained whenever

they can be. The greater the certainty of this description of title, the greater the value which will be attached to the land at the sale, and the less the quantity sold to pay the tax. But still we can not sustain a sale unless the proceedings have been regular; nor can we decide in favor of a title, unless that title is sustained by competent evidence. The mere circumstance that it is derived from a tax sale, secures to it no peculiar favor. It must, notwithstanding this, be subject to the general rules of law and evidence.

This statute is found in 23 Ohio L. 89, and it will be necessary to examine several of the sections preceding that which authorizes the county auditor to make deeds.

Section 2 requires of the auditor to take from the collector each year a duplicate list of all such taxes as the collector has been unable to collect, describing in such list, as the same are described in the duplicate, the several taxes "*returned delinquent.*" The collector is required to sign this list and testify under oath to its correctness.

In section 3 it is made the duty of the county auditor, immediately after the first Monday in June annually, to make out a list of all lands and town lots returned by the collector as delinquent, describing therein the lands according to the entries in the duplicate, charging thereon the tax and interest of the preceding year, together with twenty-five per cent. penalty and the tax of the current year. He is further required to certify and sign the same, and have the same published, in some newspaper circulating in the county, six several times between the said first Monday of June and the first day of September thereafter, attaching to said list a notice that unless the taxes, interest, and penalty shall 372] *be paid before the last Monday of December next thereafter, the lands, or so much thereof as may be necessary to make such payment, will be sold on that day at the court-house in the county.

These two sections show how the fact of the delinquency is to be ascertained, and the steps which must be taken preliminary to a sale.

Section 4 enacts "that the county auditor shall record, in a book to be by him provided, the advertisement aforesaid, and shall certify at the foot of such record the name of the newspaper wherein the same was published, within a reasonable time after such advertisement shall have been published."

By section 5 it is made the duty of the county collector, by himself or deputy, on the last Monday of December, to attend at the court-house and offer for sale the lands which are mentioned in the advertisement, and which are still delinquent; and it is further made the duty of the county auditor, by himself or deputy, "to attend during the whole time, until the whole of the lands and town lots contained in the said advertisement shall have been sold or offered for sale as aforesaid, and to make a *record* in a *substantial book* of all sales made by such collector or his deputy, as of the day when the sale commences, describing the several tracts," etc., "and who was the purchaser thereof."

Section 6 requires the county auditor to give a certificate of purchase to the purchaser. And when a part only of a tract or town lot has been sold, specifies the manner in which the county surveyor shall survey it off, and upon the production of the certificate and plan of survey of the county surveyor, by the purchaser, it authorizes the county auditor to "execute and deliver to the purchaser or purchasers a deed for the land or part of town lot so purchased and surveyed as aforesaid, which deed shall convey to the purchaser or purchasers a good title in law and equity to the land or part of town lot so sold."

Sections 7 and 8 relate to cases where the whole tract or lot is sold, and where lands sold belong to joint tenants or tenants in common.

Taking all these sections of the statute in connection with *section 9 together, it is clear that the legislature have been [373 particularly careful to secure the rights of the proprietors of land, as well as those who shall purchase at tax sale. A particular course must be taken by the collector and county auditor that the lands may be returned as delinquent. When delinquent, notice must be given in the public papers by advertisement, and further time is given for the payment of the taxes. This advertisement is to be recorded in the county auditor's office, which will perpetuate the fact of its having been duly published, and also the name of the newspaper in which the publication is made, that any person interested may resort to that paper to ascertain whether everything has been fair and legal.

In addition to this, the fact of sale is not left to be proven by parol, but is also made a matter of record. When the requisitions of the statute are complied with, and a deed made by the

county auditor, that deed "shall convey to the purchaser or purchasers a *good title* in law and equity to the land or part of town lot sold."

Had the statute stopped here, it will not be contendedbut that before a person claiming this *good title* could avail himself of it, he must show that the statute, in all its essential requisites, had been conformed to or complied with. It is only when the deed is made in pursuance of the statute that it conveys this "*good title.*" If not in pursuance of the statute, although executed by a county auditor, it would convey nothing.

Had the statute stopped here, and were it to be construed according to its letter, it might, and in some instances would, have operated to do manifest injustice. The deed of the auditor conveys a "*good title* in law and equity." By this I understand a perfect and indefeasible title." Now it *has* so happened, and *does* so happen, that the same lands are sometimes listed to different persons. In other words, they are twin taxes; mistakes of this kind are not as frequent as formerly, but they still occasionally occur. Suppose such a mistake, and suppose further, that the rightful owner pays the tax. It is not to be supposed that the person in whose name it may be listed will pay the tax. If he does not, the 374] land is returned delinquent and sold. No one can doubt *the injustice of depriving the rightful owner of the land upon which he has paid the tax; but such must have been the effect had this statute been closed with the sections referred to, because the purchaser, having the auditor's deed, has a "*good title.*"

Other hypothetical cases might be mentioned where the same iniquitous consequences would be produced. Does any one believe that such could have been the intention of the legislature?

It was to prevent consequences of this kind, as I apprehend, that section 9 was introduced in these words: "The deed made by the county auditor, *as hereinbefore specified*, shall be received in all courts as *prima facie* evidence of a good and valid title in the purchaser," etc. This is clearly a qualification of the general phraseology of section 6. If the deed conveyed a "*good title,*" it would convey a title which could not be controverted, but inasmuch as it is only "*prima facie* evidence" of a *good title*, it may be controverted, and he that hath better right may prevail against it.

It is urged, however, that this deed, being "*prima facie evidence,*"

needs no other evidence to sustain it, but becomes conclusive unless contradicted. The legislature do not say that *a* deed made by the county auditor "shall be received as *prima facie* evidence of a good and valid title," but "*the* deed," "as *hereinbefore specified.*" In other words, *the* deed made by the auditor in pursuance of this act. This is the manifest intention. Unless made in pursuance of the act, it is made without authority and void; but if in pursuance of the act, it is "*prima facie* evidence" of title.

Before the deed made by the county auditor can be received as evidence, it must be shown that he had authority to make it. This is done by showing that the lands had been advertised and sold for the taxes. All this is required to be made matter of record in the auditor's office, and there can be no difficulty in procuring the evidence. In connection with this preliminary evidence, *the* deed will be received, and the legislature has declared its effect.

Reference has been made to the judgment and execution law in argument. That law provides that the sheriff's deed shall be "*prima facie* evidence of the *legality of sale.*" The *law [375 under consideration declares the auditor's deed shall be "*prima facie* evidence" of *title.* It is supposed that inasmuch as there is this difference of expression, therefore, in the latter case no additional testimony is necessary. But we must look to the different effect of these deeds. The sheriff's deed purports to convey nothing more than the interest of the judgment debtor in the premises sold. The auditor's deed purports to convey *title*, whether that title be in the person in whose name the land is listed or in that of any other person. An individual claiming under a sheriff's deed, in addition to the exhibition of the deed accompanied by the necessary preliminary evidence, must prove title in the judgment debtor previous to the sale, unless the action be against the judgment debtor himself; but no such additional proof is required of him who claims under a sale for taxes. But in either case it is necessary to prove that the officer making the deed had authority to perform that act. Or rather it must be shown that the sheriff had authority to sell, and that the auditor had authority to make the deed, by showing that a sale had been made.

Upon the whole, a majority of the court are of opinion that there was error in the admission of the deed in evidence, and also in the instruction to the jury that the deed of itself was sufficient

evidence of title in the plaintiff to make him recover. Therefore a new trial must be granted, the costs to abide the event of the suit.

Judge COLLET dissented.

MICHAEL REED, FOR THE USE OF JONAS POLLY, *v.* NATHAN MCGREW.

Covenants for the sale of land may be discharged by parol contract upon good consideration. Case upon facts.

Parol agreement to transfer a certificate of the entry of a tract of land not within the statute of frauds.

Error in stating an abstract proposition, not applicable to the cause, no ground to reverse a judgment, or grant a new trial.

Plaintiff, who sues for money had and received on the ground of rescinding a contract, must be in a situation to restore to the defendant that for which the money was paid, or must show that the defendant has been the cause that he can not make such restoration.

New trial not granted upon discovery of an additional witness to a fact, upon which evidence was given to the jury.

THIS case was reserved in the county of Stark, on a motion made by the plaintiff for a new trial.

It was an action of assumpsit, for money had and received.

376] *On the trial of the case the following facts were proven: On August 7, 1819, the defendant entered into a contract under seal to convey to the plaintiff a quarter section of land in the county of Stark, for the sum of five hundred and sixty dollars. Previous to February 21, 1824, the purchase money was paid.

On December 20, 1822, another contract, under seal, was entered into between the plaintiff and defendant, in which they agreed to make an exchange of the quarter section of land, mentioned in the first contract, for a quarter section of land in Columbiana county, which the defendant was to convey to the plaintiff, on or before January 1, 1828. At this time the fee of the quarter section of land in Columbiana county was in the United States, but one David Henline was the owner of the certificate of entry, on which the first installment of eighty dollars had been paid. The certificate of entry lay at the United States land office, in Steubenville, subject to his order. At the same time, also, a contract was

in existence between the defendant McGrew and Henline, by which Henline was bound to transfer this certificate to McGrew.

On February 21, 1824, a verbal agreement was made between the plaintiff, defendant, and Henline, that the said Henline should transfer the certificate to the plaintiff (without any time being specified for the transfer), that Henline should pay to the plaintiff two hundred dollars, that the defendant should pay him one hundred dollars, making in the whole three hundred dollars, which was supposed to be sufficient, at least to enable the plaintiff to pay the land out of the office, and obtain a patent in his own name upon the certificate so to be transferred. This sum of three hundred dollars was admitted to have been paid. On the conclusion of this agreement, the plaintiff and defendant signed a joint order in favor of Henline and Isaac Shelton, in whose hands the certificates of August 7, 1819, and December 20, 1822, aforesaid, were lodged for safe keeping for him to deliver it up to be canceled.

It was also proven, that subsequent to this period, the plaintiff stated that he did not want a transfer of the certificate, as he could do better with his money than to pay the *land out [377 of the office. The certificate was not transferred, and on July 4, 1829, the land was forfeited to the United States for non-payment of the purchase money, and has since been sold to other persons. Some short time before the last-mentioned day, and before the commencement of this suit, the attorney for the plaintiff called upon the defendant with copies of the certificates of 1819 and 1822, when the defendant stated that Henline had transferred the certificate, and if he could establish that fact, he would refund the money received under the first contract.

Upon this state of facts the court instructed the jury: 1. That if the plaintiff agreed to give up and cancel the aforesaid contracts between him and the defendant, on the *verbal* agreement aforesaid, and agreed to take the *verbal* promise of Henline to transfer the aforesaid certificate, and to accept of such transfer and the payments aforesaid, instead of the conveyance mentioned in the aforesaid second contract between the plaintiff and defendant, *that* would exonerate the defendant entirely; although the plaintiff might have no right of action against Henline on such *verbal* agreement. 2. That even if the plaintiff once had a right to rescind, if he neglected to exercise that right until events so happened, by lapse of time or *otherwise*, that he could not be restored

to his original situation, that the right to rescind here was taken away, although the right to rescind arose from the act of the defendant.

A verdict having been returned for the defendant, the plaintiff moved for a new trial and assigned the following reasons:

1. The verdict is contrary to the evidence *in* and the law and equity *of* the case. 2. The court mistook the law in the direction to the jury. 3. Since the trial the plaintiff has discovered new and material evidence.

GOODENOW, for the plaintiff:

If by fraud, failure of consideration, or by the statute, a contract is void, the parties *are restored;* and if recoverable, *may be restored* to their original rights, and the money paid or property 378] parted with under such void or voidable contract, *may be recovered back. 15 Johns. 475, 503; 1 Ohio, 363; 1 Pet. U. S. 380.

The second instruction of the court involves the doctrine of rescindment, as far as that doctrine applies to the action of money had and received. That doctrine, in general terms, seems to be this: that any act inconsistent with the obligation and duty of the party authorizes the other party to bring this action. 1 Cow. 46; 2 Stark. Ev. 115, 116; Bull. N. P. 132; 2 Esp. N. P. 644.

What will authorize the party to rescind may be collected from the following authorities: 11 Wheat. 450, 451; 7 Term, 117; 1 New R. 351; 1 Ohio, 363; Esp. N. P. 644; 12 Johns. 274; 1 Day, 232; Cowp. 387; 4 East, 201; 3 B. & P. 162; 5 East, 449.

Whether a contract is rescinded or is still open, is a question for the jury, to be settled upon the facts. But I must confess I do not see the application of the doctrine contained in the second direction of the court to the facts submitted to the jury. I contend, that if the parol contract of 1824 was void by the statute, then the right to rescind arose on January 1, 1828; if this contract was valid and binding on the parties, as the court decided, then the right to rescind arose on July 5, 1829.

HARRIS, for the defendant:

The facts in this case show most conclusively that the equity of this case is with the defendant, and if so, the verdict ought not to be disturbed.

The doctrine of rescindment has nothing to do with the case. The contract of 1819 was canceled or satisfied by that of 1822, and this latter by that of 1824. On this latter day the parties agreed to cancel this last contract upon a valuable consideration, paid by the defendant to the plaintiff. From this time the defendant was discharged from all obligation to the plaintiff.

I have no doubt that the authorities cited upon the other side are good law, but they do not apply to this case.

If that part of the charge of the court, to which the plaintiff excepts in the second instance, had no connection *with the [379 case, as his counsel seem to think it had not, it certainly can be no reason for a new trial, even were it erroneous. But this is not admitted; on the contrary, it is believed to have been correct.

As to the newly discovered evidence, it is only to enable the party to prove by additional testimony facts which were in proof by other witnesses on the trial of the cause. And this court will not grant a new trial for the purpose of *merely* enabling a party to introduce cumulative evidence.

GOODENOW, in reply:

The newly discovered testimony is not merely cumulative. If introduced it would go to destroy the effect of some part of the defendant's evidence, especially the testimony of Henline, who was examined as a witness.

Judge HITCHCOCK, delivered the opinion of the court:

In the present action the plaintiff seeks to recover back money by him paid when in contract to the defendant, and which he claims has been rescinded, or which he has a right to rescind, in consequence of a failure, on the part of the defendant, to comply with his part of the contract. The only contract between the parties, in pursuance of which money was paid by the plaintiff to the defendant, was made on August 7, 1819. In pursuance of this contract five hundred and sixty dollars were paid. And whether the plaintiff claims to receive this amount or only the balance, after deducting three hundred dollars, which was paid to him by the defendant and Henline, does not clearly appear. I presume, however, it is the balance merely. Nor does it very clearly appear which of the three contracts (for the three were made between the parties) it is sought to rescind. The general principle can not be

controverted, that where one man pays to another money upon a contract and the contract fails in consequence of an act done by the opposite party, or in consequence of his inability to perform, the money paid may be recovered back in this form of action. And the circumstances are numerous where the party paying the 380] money, or other article *of property, may consider the contract as rescinded, and recover back his money. This is apparent from the cases cited by the plaintiff's counsel. Whether this is a case of that description remains to be considered. But under no circumstances can a plaintiff recover if the failure of the contract is attributable to an act of his. The action is an equitable action, and as in chancery, he that would have equity must do equity, so in cases of this description.

In order to determine whether the verdict in this case is against the evidence, the law and equity of the case, as is insisted by the plaintiff, it is necessary to examine the facts and inquire what legal or equitable inferences may be drawn from those facts.

On August 7, 1819, the defendant entered into a contract, under seal, by which he bound himself to convey to the plaintiff a quarter section of land, in the county of Stark, for five hundred and sixty dollars, which was paid. It does not appear, from the evidence before the court, that any time was fixed within which the conveyance should be made. It was then incumbent on the defendant to make the conveyance in a reasonable time, or upon demand, after the payment of the money. And had he refused, the plaintiff might have considered the contract as rescinded, and would have had a right of action against him for money had and received. No conveyance, however, was made, nor does it appear that any was demanded, and the business remained in this situation until December 20, 1822.

On this last day another contract or agreement was entered into between the parties. This contract also was under seal; and by it they agreed to exchange the quarter section of land in the county of Stark for a quarter section in the county of Columbiana, the defendant binding himself to convey this latter quarter section to the plaintiff, on or before January 1, 1828. Now what is the legal effect of this last contract upon the contract of 1819? It would seem to me that there could be no doubt that the latter was fully discharged; as much so as if it had been complied with according to its strict letter. The parties make an exchange of

land, quarter section for quarter section. And as the title to the quarter section in Stark was not in the plaintiff, *but the de- [381 fendant, it is *in effect* agreed that he shall retain it, and the plaintiff agrees to take his obligation, under seal, for the conveyance of the quarter section in Columbiana at a subsequent period. Everything appears to have been fair and *bona fide*. At least nothing to the contrary appears, and is not to be presumed. After this, the plaintiff surely could not have any claim under the contract of 1819. True, an end was put to it, but not in such a manner as to enable him to sue for and recover back the money paid, or to sue upon the contract itself and recover damage for its non-performance. By his own act, in concurrence with the act of the defendant, it was closed, and he received that which he considered, and which the law would consider, as full satisfaction.

By the terms of the contract of 1822, a conveyance was to be made of the land in Columbiana county, on or before January 1, 1828. But before that time, to wit: on February 21, 1824, another agreement was made between the plaintiff and defendant, together with Henline, with reference to the same subject matter, to wit: the quarter section of land in Columbiana. This agreement was by *parol* or *verbal*. Before I proceed to examine it, it may be well to inquire into the relative situation of all the parties at that period. Henline was entitled to the certificate of entry of this land, which was then in the land office at Steubenville, subject to his order. The first payment of eighty dollars had been made, and upon the payment of the balance, the person entitled to the certificate could have a patent. Henline was under contract to transfer this certificate to the defendant, McGrew. And from the circumstance that Henline paid the plaintiff two hundred dollars, it would seem that McGrew must have paid him, Henline, in part or in whole, for the quarter section. Probably, however, no more had been paid than the two hundred dollars. McGrew was under contract to convey this same quarter section to the plaintiff. The only evidence of title which any of the parties would then have, would be the certificate of purchase, as no patent could issue until the land was paid for in the office.

Such being the situation of the parties, they met on *Feb- [382 ruary 21, 1824, and agreed, *verbally*, that Henline should transfer the certificate direct to the plaintiff, and that the defendant and Henline should pay him three hundred dollars, a sum sufficient to pay

the land out of the office, and which was paid, two hundred dollars by Henline, and one hundred dollars by the defendant. On the conclusion of this agreement, the plaintiff and defendant gave an order in favor of Henline, upon Shelton, in whose hands the contracts of 1819 and 1822 had been lodged for safe keeping, for him to deliver up the same to be canceled. By the terms of this contract or agreement, it will be seen that the defendant surrendered up all claims which he had upon Henline for the certificate for the land. In fact, he put it out of his power to comply with the contract of 1822. He put it out of his power to procure the land. And through his instrumentality, the plaintiff was furnished with means to buy the land out of the office and procure a patent in his own name. It seems to have been clearly the intention of all the parties that this power should be vested in him. From all the circumstances attending this transaction, there can be no doubt that it was the understanding at the time this agreement was made, that it should supersede the contract of 1822. Instead of the conveyance of the quarter section in Columbiana, the plaintiff agreed to receive the three hundred dollars, and also an assignment of the certificate, for which assignment he was to look to Henline. It was the intention to put an end to the last-named contract else why deliver it up to be canceled? Still, although an end was put to the contract, it was not under such circumstances as to give the plaintiff a right of action. From this time the defendant might well suppose that he was discharged from any further liability. He had put it in the power of the plaintiff to obtain a title to the land, had furnished him the means with which to do it, and had procured his order to have the contract canceled.

But suppose he was not thus discharged, let us see whether there is anything further in the evidence which would make him liable. From the time this last agreement was made between the plaintiff, defendant, and Henline, we hear nothing further respecting the subject matter until 1829, except that the plaintiff stated that he 383] did not want the *certificate, and that he could do better with the money than to buy the land out of the office. But in the year 1829, and previous to the month of July, he sent his attorney to the defendant with a copy of the two first contracts. The defendant then stated that Henline had transferred the certificate, and that if he had not, he, the defendant, would refund the money.

In July the land was forfeited, and sold by the United States to other persons.

This evidence shows that the plaintiff has never acquired a title, but this would not give him a right of action, unless he had been prevented by some act, mistake, or default of the defendant It was not the duty of the defendant, but of the plaintiff, to pay the land out of the office, and the money with which to do it he had received of the defendant. But this he did not do, nor is there any evidence that he attempted to do it. It was not necessary that he should have the certificate for this purpose, for although he might not be able to acquire a patent without the certificate, he might have deposited the money, and thus have secured the land. No time was specified within which the certificate was to be transferred, yet there is no evidence to show that the plaintiff made an effort to obtain it by demand or otherwise. The transfer, however, was not to come from the defendant, but from another person. Why all this neglect on the part of the plaintiff? It can be accounted for upon no other reason than the one stated by himself, that he did not want the certificate, and could do better with the money than to pay the land out of the office. This circumstance of the plaintiff's lying by for so long a period, and waiting until the time was about to elapse when the land would be forfeited before he makes a single move, and then, instead of applying to the office to pay the money, or to Henline for a transfer of the certificate, applying, through his *attorney*, to the defendant with copies of the original contract, taken in connection with the other facts of the case, looks too much like a design on his part to wait until it should be out of the power of the defendant to procure a title, and then to call upon him for money paid some two years before. Or perhaps, which is the most favorable supposition for the plaintiff, this attempt to recover back money is an *after-thought. Upon the whole, it seems to the court that [384 the verdict is consistent with the evidence, the law and equity of the case.

The next question is, whether the court erred in their instructions to the jury. Amongst the other things, the court charged the jury "that if the plaintiff agreed to give up and cancel the aforesaid contract, between him and the defendant, on the *verbal* agreement aforesaid, and agreed to take the *verbal* promise of Henline to transfer the aforesaid certificate and to accept of such transfer, and

the payment aforesaid, instead of the conveyance mentioned in the aforesaid second contract, between the plaintiff and defendant, *that* would exonerate the plaintiff entirely, although the plaintiff might have no right of action against Henline on such *verbal* agreement."

Now I see nothing wrong in all this. The parties had a perfect right to cancel their contracts, and if they agreed to do it upon sufficient consideration, such agreement would be obligatory upon them. It was certainly competent for the plaintiff to take the three hundred dollars and the assumption of Henline, to transfer the certificate in full satisfaction of the contract of 1822, and if he did so, the defendant must be discharged from the obligation of this contract. Otherwise, what would be the situation of the defendant? He had given up all right on his part to call upon Henline for a transfer of the certificate. He had parted with the money which would have enabled him to clear the land out of the office, and had paid that money over to the plaintiff, who took upon himself the performance of this task. If this was not such a settlement between the two parties as would discharge the defendant, it is difficult to conceive what compromise or settlement would do it. Now, can it be very material whether this "*verbal agreement*" to transfer was or was not obligatory upon Henline. It was not the only or principal consideration passing between the parties. The payment of the money was of more consequence. But there was not only a payment of money, there was the surrender of a right on the part of the defendant to the plaintiff; the right to call upon Henline for transfer of the certificate, and the right to receive a patent for the land upon the payment of the purchase money.

385] *But is it so that the plaintiff would have had no right of action against Henline? It is supposed by the counsel for the plaintiff that this contract is within the statute to prevent frauds, and therefore void. Section 5 of this statute has this clause: "No action shall be brought whereby to charge the defendant upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them," unless the agreement or memorandum thereof be in writing. 29 Ohio L. 218. This was not a "contract in sale of lands," or of "any interest" in lands. It was merely a contract for the transfer of a certificate, which would not vest in the person to whom the transfer was made any "in-

terest in the land." The only effect would be to place in his hands *evidence*, which, upon the payment of a certain sum of money, would enable him to procure an "interest in the land." If I am correct in this, the contract is not within the statute, and of course is obligatory.

The court further charged the jury, "that even if the plaintiff once had a right to rescind, if he neglected to exercise that right, until events so happened, by lapse of time or *otherwise*, that he could not be restored to his original situation, that the right to rescind here was taken away, although the right to rescind arose from the act of the plaintiff."

The counsel for the plaintiff remarks "that he does not see the application of the doctrine of this part of the charge to the facts submitted to the jury." And certainly I do not perceive the necessity of this part of the charge. According to my apprehension of the facts, the doctrine of rescinding contracts has nothing or very little to do with the case. The defense relied upon is that there had been a compromise between the parties, and that although the defendant had not literally complied with his contract, he had made complete and adequate satisfaction. But undoubtedly the subject of the rescission of contracts was discussed upon the trial of the cause by the counsel, and the court were led to express an opinion upon that subject without reflecting whether it were or were not necessary. But if it had no application to the facts of the case, what is to be the consequence? We consider it as well settled that, although a court may err in the expression of an opinion upon an abstract *question of law, which is in [386 no way involved in the decision of the case on trial, still there is no cause for the reversal of a judgment or setting aside a verdict.

The charge in this case is, however, substantially correct.

Where the plaintiff sues to recover back money paid upon a contract which has failed, he must show that he has done all in his power to restore the defendant to the same situation in which he was when the contract was made. If the possession of the property contracted for has passed to the vendee, it must be restored to the vendor; and if, owing to the negligence, or any other act of the vendee, it is not in his power to restore the possession, although he is not without remedy, still he can not have the action for money had and received. He must sue upon his contract, and recover damages for its violation. For instance, A.

contracts to sell a quarter section of land to B., and receives one-half the purchase money. B. takes possession. The title afterward fails, or A. refuses to convey. B. may surrender the possession to A., thereby assenting to a rescission of the contract, and recover back the money paid in an action for money had and received. Or he may consider the contract as subsisting, and claim damages for its breach. In the latter case it would not be necessary, as a preliminary step, that he should surrender the possession. But suppose B. has sold the same land to C., and delivered unto him the possession. In such case he *must* resort to his action on the contract, *because* by his *own* act the possession had been transferred to another, whereby he is prevented from restoring his vendor to his original situation. I think these positions can not be controverted. And, according to my understanding, this is the extent or meaning of the charge of the court.

Another reason urged for a new trial is the discovery of evidence, since the trial, material to the case. This newly-discovered evidence is not evidence, the effect of which will be to prove new and distinct facts, but rather to prove facts by a new witness, which were testified to by other witnesses on the trial, and also to prove circumstances which will have a tendency to invalidate the testimony of one of the defendant's witnesses. This court will not grant a new trial to give a party the opportunity of in-
387] troducing cumulative *testimony *merely*, or to give him the opportunity of impeaching the witnesses of his adversary. But there is in this case another reason why a new trial should not be granted on account of the discovery of this new testimony. Had it been before the jury, it would have still been their duty to return a verdict for the defendant.

An argument urged in favor of the motion ought to have been considered before. It is founded upon the promise made by the defendant to the attorney of the plaintiff, that he would refund the money if the certificate had not been transferred. If there was any legal obligation on the part of the defendant to refund the money, that obligation could be inferred without the promise. If there was no legal, but a moral obligation, to refund it, then that moral obligation would be a sufficient consideration to sustain the promise. Without consideration, the promise would be void. To my mind it is clear that there was no moral obligation resting upon the defendant to refund this money to the plaintiff. By the

agreement of 1824 he had been completely exonerated. It was rather owing to the neglect of the plaintiff himself, than to any act of the defendant, that he did not get a good and valid title to the and in Columbiana. There was, then, no consideration for this promise. It is therefore *nudum pactum* and void.

The motion for a new trial must be overruled, and judgment entered on the verdict.

LESSEE OF HEZEKIAH SPERRY *v.* MOSES POND AND OTHERS.

A conveyance, on condition that the grantee shall keep a saw-mill and grist-mill doing buisness on the premises, is a valid one, and if the grantee fails to perform the condition he forfeits the estate.

THIS was an ejectment tried on the last circuit, in Trumbull county. A verdict was found for the plaintiff, and a motion made by the defendant for a new trial, which was reserved for decision here.

*It was proved on the trial that Sperry, the lessor, was [388 seized in fee of a tract of land through which Mill creek flows, in the county of Trumbull. That being so seized, he, on September 10, 1817, by a deed duly executed, for good consideration, granted to Isaac Clark, his heirs and assigns, the privilege of erecting on the said tract of land a grist and saw-mill, with any other machinery attached, at such place as Clark should select; of damming the stream and digging the necessary mill races, and to have a quarter of an acre for a mill yard at each mill. The said mills and privileges to be held and enjoyed by the said Clark, his heirs and assigns, "so long as they should continue to use and improve the same for the express purpose of grinding, and no longer." That on December 11, 1820, Sperry, by deed duly executed, for the consideration, as expressed in the deed, of one hundred and fifty dollars, conveyed to Clark, his heirs and assigns, one acre of land described by metes and bounds, including the mills and half acre mentioned in the deed of 1817, and a part of the above tract owned by Sperry, to be enjoyed and occupied by the said Clark, his heirs and assigns, "so long as he, the said Clark, his heirs and

assigns, shall keep a saw-mill and grist-mill doing business on the premises, allowing, however, all necessary time for repairs, and no longer." That Clark erected on the premises a grist and saw-mill and put them in operation; that in 1820, he sold and conveyed all his interest in the mills and premises to the defendant, Pond, and put him in possession; that about six months after Pond purchased, the grist-mill, for want of repair, was stopped running; it remained so until the spring of 1825, when it was repaired and run, as the water would admit, until some time in 1826, when it was again stopped running, and has not since been repaired or run. That the saw-mill was continued in operation by Pond from the time he purchased, as the water would admit, until the spring of 1824, when the forebay gave way, and it was not again started until the fall of 1825; water was then conveyed to it by a trough, 389] and some *sawing occasionally done. In the spring of 1826 the forebay was reconstructed, and the saw-mill repaired, and when there was water sufficient, it has ever since been kept in operation. That the stream would drive one of the mills about three months in the year; both, not more than three days at a time. It was also proved or admitted, that the defendants were in possession when this action was commenced, and that Sperry had not parted with the reversion.

STONE, for the defendants, cited Cruise Dig., tit. 13, sec. 1; 4 Johns. 186, 215, 25.

LOOMIS and METCALF, for plaintiff, cited 2 B. C. 155; Cru. Dig., tit. 13, secs. 65, 66; 10 Rep. 41, 42; Co. Lit. 214 a, n. 1, 2.

Judge COLLET delivered the opinion of the court:

When the first deed was made, it was not known where the mills would be erected; when the last deed was executed this was ascertained. By it an acre of land, described by metes and bounds, including the mills and yards and privileges conveyed by the first, was conveyed to Clark, his heirs and assigns, to be occupied by them "so long" as they kept a saw-mill and grist-mill, doing business on the premises, "and no longer." After the execution of this deed the premises were held according to its terms; if they vary from the terms of the first deed, the last must govern. The parties had the power and the right to vary them. The contin-

gency, by the happening of which the estate granted might be defeated, is substantially the same in both deeds. The estate granted is made to depend, for its continuance, on keeping a grist-mill and saw-mill on the premises doing business, as much of the time as the water, and the necessary time to repair them, would admit of, and no longer; not on keeping a saw *or* grist-mill doing business. It is plain and unambiguous; we can see no room for construction. As the parties make their deeds and contracts, the court must take them.

*It is probable that the stream would not justify keeping [390 both mills in repair on the premises; that the defendants had better lose their estate in them than do so. This, the court can not take into consideration. It was not *impossible* for them to keep both mills in repair on such a stream.

No inference can be drawn to preclude the plaintiff's right to recover, from his not bringing an ejectment at an earlier period; although the grist-mill did no business, and was out of repair from 1821 until 1825, and from 1826 until the bringing of this action, and the saw-mill from the spring of 1824 until the fall of 1825. The estate conveyed by the deed to Clark was a qualified or determined fee. If the terms of the deed are such, as to be construed a limitation (although the reversion was not disposed of, and Sperry could enter for a forfeiture without destroying any remainder), then, the estate of Pond terminated in 1821, and by operation of law, vested in Sperry, where it has ever since remained. 2 B. C. 109, 155. If the estate of Clark was on condition in deed, then the forfeitures, which happened by suffering the grist-mill to remain still and out of repair, in 1821, and suffering the saw-mill to remain still and out of repair, in 1824, were saved by having them both running in 1826. If Sperry knew of their being out of repair, and of the repairs going on, and did not enter or forbid the repairs; but by supposing the grist-mill to go out of repair in 1826, and cease to grind, a forfeiture again occurred, and as the grist-mill was not repaired and put in operation before a demand was made by Sperry, the forfeiture still continues. An entry or demand of Sperry revested the title in him. The bringing this action is such a demand as, in England, would entitle him to recover for the forfeiture. 2 D. Rang. 750; Burt. on Ed. 46. The judges who tried this cause remember, that on the trial it was proved that a demand and entry was made by Sperry some time

before the commencement of this suit. If Sperry was ignorant of, or did not assert his claim as soon as he might, he does not thereby forfeit his title.

391] *These mills, if kept in operation, as the water would permit, would increase the value of the balance of Sperry's tract of land, and be a benefit to the occupier of it. This probably, with Sperry, was a part of the consideration for making the grant. Upon the whole, the court overrule the motion for a new trial and enter judgment on the verdict.

D. Z. AND D. C. COOPER v. MICAJAH T. WILLIAMS.

Decision as to water power in the canal, 4 Ohio, 251, affirmed.

BILL of review reserved in Montgomery county.

The decree, which it is sought to have reviewed in this cause, was entered at the January term, 1831, of this court, and is reported in 4 Ohio, 251. The original case, together with the argument of counsel, is so fully reported that it is deemed unnecessary again to state it; more especially as the case is now submitted upon the same arguments.

Judge HITCHCOCK delivered the opinion of the court:

As the principles involved in this case are very important, we have bestowed upon it all the deliberation which that importance seemed to require, and, after the most careful examination, are not able to discover that there is anything erroneous in the decree.

In the opinion expressed by the court, on the trial in the original case, we concur so far as that opinion is decisive of any point, and it is unnecessary at this time to go into a course of argument to prove the correctness of the decision.

In that opinion, some doubt is expressed whether this court could with propriety interfere to restrain the canal commissioners from withdrawing more water from Mad river than what was necessary

392] for canal purposes. Upon *that point I have no doubt. The canal commissioners are authorized to take private property

for the use of that work, but it must be done in such a manner as to do the proprietor no "*unnecessary damage.*" It is for the purposes of the canal *alone* that they can take it. And if they attempt to go beyond this, it is within the jurisdiction of this court to restrain them.

Although the law authorizes them, in some cases, to dispose of the water, for hydraulic purposes, with a view to raise a revenue to aid in defraying the expense of this work, still this relates only to the water which is necessary for the navigation of the canal, and which can be used for these other purposes without interfering with that navigation. It does not authorize them to receive a surplus quantity of water into the canal, that they may dispose of it, especially when an injury should be thereby done to an individual. Private property can only be taken by the government or its agent, when necessary for the "*public welfare,*" and in such case compensation must be made.

A riparian proprietor possesses the same right to the *use* of the water flowing through his land that he does to the land itself. The water itself is not his. It is the use. And in this use he can not be disturbed by an adjoining proprietor, either above or below him. Neither can he with impunity interfere with the right of such proprietor. Of this right he may be deprived, if the "*public welfare*" require it, so far as that *public welfare* does require, he first having been compensated for the injury.

When the water was taken from the river at Dayton to feed the canal, the complainants were deprived of a right. And for this they did, or might have received a compensation. But they can not follow this water in the canal and make use of it for water-works wherever a convenient site may offer. And this, because they have no exclusive property in the water, but in its use while flowing over their land. When withdrawn from the river, its natural channel, and flowing in the canal, this use is vested in the state, and may be disposed of by her agents, so that the navigation is not impeded.

*But as the *public welfare* does not require that any more [393 should be withdrawn from the river than is necessary for the navigation of the canal, no more can be taken; and should an attempt be made to take more, this court might prevent it by injunction.

In the opinion of the court which originally heard this case,

there was no evidence that any surplus water was withdrawn from the river, and we entertain the same opinion.

The bill is dismissed at the costs of the complainants.

ALEXANDER COTTER *v.* WILLIAM DOTY.

In replevin, plaintiff may put in a double replication.

An ordinance of the city of Cincinnati enforcing a penalty, without legal adjudication, is void.

THIS case was reserved in the county of Hamilton.

It is an action of replevin, in which the plaintiff declares that the defendant, on May 1, 1830, wrongfully detained fifty kegs of gunpowder, of the value of four hundred dollars, the proper goods and chattels of the plaintiff.

The defendant pleaded three several pleas, in the third of which he justifies, "That he, as marshal of the city, under an ordinance passed December 16, 1826, seized the powder in a storehouse in Cincinnati, the same being a greater quantity than the ordinance permitted to be kept within the corporation at any one place. That having seized the powder, the defendant conveyed it to a place of safety, as he had a right to do."

The plaintiff replies: 1. That the powder was placed in the hands of one Samuel R. Perry for transportation, who, without the plaintiff's knowledge, stored it in Cincinnati, and was fined by the mayor for that offense one hundred dollars. 2. That the powder, after having been removed without the city to a place of safety, was demanded of the defendant, who refused to deliver it up, although it was forfeited by the city ordinance.

394] *To this replication the defendant demurs.

STORER and FOX, for the defendant, suggested a doubt whether the double replication of the defendant was regular; but being desirous that the case should be settled upon the merits of the *whole* pleadings, waived any objection on this account.

They alleged that the two following questions were presented by the pleadings:

1. Had the city council, under the act of 1815 (the act in force when the ordinance under which the defendant justifies), the power to create a forfeiture; and if so, could they enforce a *forfeiture* and *penalty* at the same time and for the same act. 2. Could such forfeiture be enforced, unless some legal adjudication condemning the property as forfeited should be first had.

They admitted that without express power conferred in their charter no corporation could create a forfeiture. Such power could not be brought into existence by implication. And they cited 8 Co. 249, C. Dub. ed. of 1793; 2 Vent. 182; 1 Term, 118; 2 Johns. 380. But they contended that this power was expressly conferred by the act of 1815.

Upon the second question raised, they agreed that the necessity of the case required the mode of proceeding authorized by the ordinance. Before a legal adjudication could be had, the mischief intended to be provided against might have happened. They cited many hypothetical cases supposed to be analogous, where delay to obtain a legal adjudication would be followed by inevitable ruin, such for instance as where, in case of fire, when it became necessary to remove or destroy contiguous buildings to prevent the spread of the flames.

N. WRIGHT, for the plaintiff:

If it be admitted that a forfeiture of the kind under consideration could be imposed under the city charter, still it could not be imposed in addition to the fine. Mayor, etc., of New York *v.* Ordrina, 12 Johns. 122, is a case in point.

But the charter of 1815 gives no power, express or implied, to create a forfeiture. And unless it be given in the charter, *an ordinance by which it is attempted to be enacted is [395 void. 2 Com. Dig. 292; 8 Co. 127; 1 Bac. 551; 1 Dunf. & East, 118-124; 2 Maule & S. 53, 60.

I insist, in the next place, that if this charter authorized a forfeiture of goods, it could not be enforced in the manner provided in the ordinance in question. It is against the spirit of the constitution. Art. 8, sec. 5. It is against the whole spirit of the common law, as understood in England and in this country. 1 Bar. 551.

In the grounds I assume, I concede to the city all that is really necessary for the safety of the city, and all the ordinary remedies to enforce obedience to this by-law, all, indeed, except an arbitrary forfeiture. I allow them to seize and remove the powder out of the city, and to fine for the offense.

HITCHCOCK, J., delivered the opinion of the court:

A doubt has been suggested as to the regularity of the pleading in this case, on the ground that the plaintiff has replied double to the third plea of the defendant. This subject is regulated by statute. Section 47 of the practice act, 29 Ohio L. 67, provides "that it shall be lawful for the plaintiff in replevin, or for the defendant or tenant in any other action in any court of record, with leave of such court, to plead as many several matters as he shall think necessary for his defense." In replevin both parties are considered as actors. And if the defendant avows or justifies to this avowry or justification, the plaintiff may reply or plead double. Such is the intendment of the statute; the pleadings, therefore, are regular.

The decision of this case depends upon the validity of so much of the ordinance under which the defendant justifies, as creates forfeitures and attempts to enforce them, without legal adjudication or investigation. This ordinance was enacted in December, 1826, by the city council of Cincinnati, and, together with others, contains the following sections:

"Sec. 16. Be it further ordained, that no person or persons shall be allowed to keep in any house or other building within the boundaries of the corporation of this city more than twenty-eight pounds 396] of gunpowder at any one time, *which twenty-eight pounds shall be divided into at least four parcels, and each parcel secured in stone jugs with tight stoppers, or in tin canisters provided with safe and sufficient covers; and not more than seven pounds in any jug or canister as aforesaid; and any person or persons keeping twenty-eight pounds of gunpowder, or less, within the boundaries aforesaid, and shall neglect or refuse to parcel and secure it in manner aforesaid, shall forfeit the same to the corporation; and any person or persons keeping any greater quantity than twenty-eight pounds within the boundaries aforesaid, shall forfeit the same, and shall pay a fine of twenty dollars for every hundred weight that he, she, or they, may have in their possession; and

in that proportion for any greater or less quantity, on conviction thereof before the mayor; *provided*, that nothing in this ordinance shall be so construed as to prevent any person from conveying gunpowder through the streets to some place of deposit without the limits of the corporation; *provided*, that all gunpowder shall be put up in tight or sufficient casks or kegs."

Section 11 makes it the duty of the city marshal and his deputies, and the chief and assistant engineers of the fire department and any of the fire wardens, on any day (Sundays excepted), to enter into any building where gunpowder is kept or supposed to be kept, and examine the premises, and if any gunpowder is found contrary to the provisions of the preceding section, it is made their duty to receive the same and convey it to some safe place of deposit without the city. And it is further made the duty of the marshal, after having given three days' publication, to sell all the gunpowder so seized, to the highest bidder, for the benefit of the corporation.

This section contains further provisions, to which it is unnecessary to refer.

The first important question is, did the corporation, under their charter, possess power to create this forfeiture? For no matter how expedient it may be, it can not be sustained unless the power is granted in the act creating the corporation. A corporation may, nay, they must, from the necessity of the case, have power to regulate their own internal concerns; and this, although the power is not specifically granted. But *the power to create forfeit- [397
ures is a high power; one which will not be exercised by the legislature of the state except in extreme cases. Certainly, then, no corporation shall be permitted to exercise this power, unless under an express and explicit grant of the right. But about this there is no dispute. The principle is not controverted.

It is claimed, however, that the power was created by the act of incorporation. The law in force at the time this ordinance was enacted, was the act of January 10, 1815, 13 Ohio L. 60. Section 7 defines the powers and duties of the town council, and among other things authorizes them "to impose reasonable fines on all persons offending against the laws and ordinances aforesaid, and to cause all such fines and all *such forfeitures and penalties* as may be incurred, under the laws and ordinances of the corporation, to

be assessed, levied, and collected in such manner as they may prescribe."

This is the only part of the law in which reference is had to *forfeitures*. It is clear that here is no express grant of power to create a forfeiture, and without such express grant, the power can not be exercised. But was it even proper to imply it, it could not, in the opinion of the court, be implied from this clause. The first part of this clause grants the power "to impose reasonable fines," and the latter part grants the power to prescribe the manner in which these fines may be *assessed*, *levied*, and *collected*. True, the words *forfeitures* and *penalties* are used, but from the manner in which they are used, from the connection in which they are placed, it is manifest that nothing more was intended than *fines* merely. Else why speak of that which is to be *assessed*, *levied*, and *collected*?

In the "act to incorporate the city of Cincinnati," etc., 25 Ohio L. 40, this power is expressly granted. Section 8 authorizes the city council "to impose fines, *forfeitures*, and penalties on all persons offending against the laws and ordinances of said city, and provide for the *prosecution*, recovery, and collection thereof." By section 24 of this act, "all laws, ordinances, and resolutions heretofore lawfully passed and adopted by the city council of said city," are con-
398] tinued in force until repealed. Now, although at the *time the property in controversy was seized, the city council possessed this power, inasmuch as the defendant acted under an ordinance made at a time when they did not possess it, it will not avail him in his defense.

That the city council, under the law of 1815, had the power to pass a law to prevent large quantities of gunpowder from being kept in the city, we have no doubt. For offending against an ordinance of this description they might impose fines. With equal propriety they might provide for its removal to a safe place without the limits of the corporation. But they have not the power to declare it forfeited, nor the right when it is removed to withhold it from the owner.

Inasmuch, then, as the defendant, after the gunpowder was removed to a place of safety, refused, upon demand made, to deliver it up to the plaintiff, he is not justified. The replication is sufficient in law, and upon the demurrer, judgment must be entered for the plaintiff.

Such being the opinion of the court upon the first question raised

by the defendant's counsel, it is unnecessary to consider the second. But were it necessary, we should have no difficulty. No man ought to be deprived of his property by forfeiture without having a legal investigation. And an ordinance of a corporation which violates this principle, is not consistent with the spirit of the laws of the United States or of this state.

LESSEE OF WILLIAM SELLERS *v.* ICHABOD CORWIN ET AL.

Judgments in the United States Circuit Court for the District of Ohio, rendered previous to May, 1828, attached as liens upon the defendant's lands, throughout the state, in virtue of the adoption, by that court, of the execution laws of the state, for the regulation of its practice.

Between judgment creditors where a year transpires before execution upon either judgment issued out, execution first issued and levied obtains preference.

Purchaser upon execution entitled to benefit of occupying claimant laws.

EJECTMENT to recover two lots in the town of Lebanon, adjourned from the county of Warren. The plaintiff claims title under a marshal's deed upon a sale on a judgment and execution in the Circuit Court of the United States for the District of Ohio. This judgment was rendered January 8, 1822, execution issued *February [399 5, 1823, and levy was made August 20th, in that year. Several writs of *venditioni exponas* were issued, but no sale was effected until August 9, 1831.

The defendants rest upon a sheriff's deed and sale upon execution on a judgment of the court of common pleas of Warren county of August 11, 1821. The first execution upon this judgment was issued October 19, 1821. Several other executions were afterward issued but no levy was made on the lots in question. In September, 1823, further proceedings on this judgment were enjoined in chancery, and the injunction was not dissolved until December 24, 1825. A new execution was issued on February 8, 1826, and levied on the lots in question. Upon this levy they were sold to Corwin, the defendant, and deeded to him by the sheriff.

Each of these parties when they purchased had notice in fact of the claims of the other, or the judgments. The cause is submitted upon an agreed statement embodying the above facts. The several judgments binding this property are fully stated in Shuee et al. *v.* Ferguson et al., 3 Ohio, 136.

P. Ross, Woods, and T. R. Ross, for plaintiff, cited 10 Wheat. 1, 51; 1 Peters, 604; Act of Congress, May 19, 1828; 2 Ohio, 65; 3 Ohio, 135, 136; 10 Johns. 336; 3 Wils. 345; 3 Johns. 526; 18 Ohio L. 180; 20 Ohio L. 68; 22 Ohio L. 108.

A. H. Dunlevy, for defendants, cited judgment and execution laws of Ohio of 1824; United States Judicial Act of 1789 and 1797; 1 Gall. 5, 371; 5 Ohio, 138; 12 Johns. 162; 2 Bin. 223; 5 Ohio, 68; 10 Johns. 386; 3 Johns. 525; 3 Wils. 345; 6 Johns. 284; 1 Smith, 66; Pur. Dig. 204; 2 Bin. 66, 80; 2 Harris Ent. 776, 777; Tidd's Pr., F. 219; 22 Ohio L. 114.

400] *Judge Wright delivered the opinion of the court:

The case presents the two following as the main questions for the decision of the court:

1. Whether judgments of the Circuit Court of the United States in Ohio are liens upon land, and to what extent?

2. Whether the sale upon the junior judgment, under which the plaintiff claims, vests in him a title discharged of the prior judgment in the state courts?

1. This court determined in Roads *v.* Symmes et al., 1 Ohio, 261, that the judgments of a court of record operated as a lien upon the real estate of the defendant. This is a principle of law, say the court, which "has been acted upon from the commencement of the administration of justice in the country," and say the court also, "it is equally well settled that the lien is co-extensive with the territorial jurisdiction of the court that renders the judgment. The general court of the territory exercised its jurisdiction, and sent its process, original and final, into any county in the territory. The judgments rendered by it were, of consequence, a lien or a charge upon the lands owned by the defendant anywhere in the territory." In McCormick *v.* Alexander, 2 Ohio, 65, this court say, that "in the state of Ohio, from its first settlement, judgments have operated as liens upon lands and real estate of the judg-

ment debtor. Lands have always been liable to be sold on execution."

The process act of Congress, temporarily passed in 1789, and made permanent in 1792, 2 U. S. Laws, 72, 300, provided that until further provision should be made in that or other acts of the United States, the forms of writs and executions, and modes of proceeding in the circuit and district courts of the United States, in suits at common law, should be the same as was *then* (1789) *used* in the Supreme Courts of the same, and when different kinds of execution were issuable in succession, a *ca. sa.* being one, the plaintiff might take out that writ in the first instance. Section 14 of the United States judiciary act of 1789, 2 U. S. Laws, 62, conferred upon the courts of the *United States "power to [401 issue writs of *scire facias*, *habeas corpus*, and *all other writs* not specially provided for by statute which may be necessary for the exercise of their respective jurisdictions and agreeable to the principles and usages of law." Section 18 authorizes these courts to *stay execution* in certain cases, in order to give time to move for a new trial. Section 34 declares "that the laws of the several states, except when the constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decisions on trials at common law, in the courts of the United States, in cases where they apply." The act of 1793, in addition to the last-mentioned act, 2 U. S. Laws, 367, provides that when it is required by the laws of the states that goods taken in execution on a *fi. fa.* shall be appraised previous to sale, it shall be lawful for the marshal to summon three appraisers, and for them to appraise any goods taken on a *fi. fa.* issued by the United States courts, in the same manner as if the writ had issued out of a state court. The act further to regulate processes in the courts of the United States, passed May 19, 1828, Acts 1st Sess. 20th Con. 56, in section 1 adopts the forms of *mesne process* used at that time in the highest court of each of those states, which have been admitted into the Union since September 29, 1789 (except in Louisiana), for the courts of the United States in those states, subject to such alterations as said courts should deem expedient, and to such rules as the Supreme Court should adopt. Section 3 adopts into the United States courts in each of those states, in like manner, "writs of execution and other final process," "and the proceedings thereon" then [May 19, 1828] used in the courts of the state, re-

serving to the United States court power, "by rules of court, so far to alter final process in said courts as to conform the same to any change which may be adopted by the legislatures of the respective states for the state courts." These provisions, it is believed, embrace all the legislation of Congress bearing directly upon the question under consideration.

402] *The act of 1789 was not applicable to the Ohio district. Neither the district nor state was then formed. The territory, now the State and District of Ohio, was then subject to one incipient organic law of the United States, adapted to the lowest grade of territorial communities. That act adopted the forms of process, etc., used in the Supreme Court of each state in 1789. The State of Ohio was formed in 1802, the District of Ohio in 1803. In 1789 it had no Supreme Court, nor any process then in use in such court. The subject of the lien of judgments in the United States courts has been looked upon by the profession as a vexatious one, but we are not aware of the question now to be decided having been before any of the courts. The act of May, 1828, we do not think, with the counsel for the plaintiff, removed all difficulties. It is supposed to be *prospective* in its operation, and not to affect the judgment of 1822, and levy in 1823, under which the plaintiff makes title. That act very materially alters the act of 1788. It adopts *in those states admitted into the Union since that time, the mesne process and modes of proceeding used in the highest courts of the state, May* 19, 1828; while it adopts for *all the states* in the Union, no matter when admitted, *the final process and proceedings used in the courts of the state at that time.* It will doubtless exert a salutary influence upon the practice in the federal courts. While the act evinces a desire in the general government to conform the practice of its judicial tribunals to that of the states, it properly forbears to adopt the changes which the states may make, leaving such changes to be by the courts adopted into the practice if deemed expedient.

The laws of Ohio in force when the judgment in question was rendered in the circuit court, make judgments in the state courts liens upon lands from the first day of the term on which they were rendered in the courts where the judgment was taken. It is contended, and we think successfully, that the acts of the Ohio 403] assembly, in their terms, *only establish the lien of judgments of the courts of the state. Those laws were enacted as rules for the Ohio courts. The legislature, in the very nature of

things, could only intend to enact laws upon subjects within their constitutional jurisdiction, not to embrace subjects and tribunals especially confined to another and distinct government. Such laws do not by their mere enactment, become rules for the courts of the United States. For rules to govern the proceedings of these courts, we must look to the Congress, and to the judicial decisions or rules of the courts of the United States themselves. Judgments are not liens upon lands at common law. Such liens are the creatures of positive statute. The Supreme Court of the United States in Parkin *v.* Scott, 12 Wheat. 179, recognizes this position, and holds such liens to have capacity to bind and hold land so long as the statute preserves them in force. This court, in McCormick *v.* Alexander, 2 Ohio, 65, adjudge that judgments are not of themselves liens upon either real or personal property. They depend upon legislative enactment, are varied from time to time as policy dictates, and the provisions on the subject differ widely in different states. 4 Kent Com. 428–430; 2 P. Wms. 491.

In the United States *v.* Worson, 1 Gall. 518, the circuit court determined that section 34 of the judiciary act of 1789, making the state laws rules of decision in the courts of the Union, did not apply to the *process and proceedings* in those courts.

In Palmer *v.* Allen, 7 Cranch, 564, the Supreme Court of the United States held that the process act of 1789 did not give efficacy to the laws of Connecticut touching the mode of executing processes in the United States courts, or impose upon the officers of the United States an obligation to conform their conduct to those laws.

That court, in Robinson *v.* Campbell, 3 Wheat. 212, held that the remedies in the courts of the United States, at common law and equity, are to be, not according to the practice of state courts, but according to the principles of common law and equity, as distinguished and defined in the country from whence we derive our knowledge of those principles.

*In Wayman *v.* Southard, 10 Wheat. 1, that court held [404 that Congress had the exclusive authority to regulate the proceedings in the courts of the United States, and the states have no authority to control these proceedings, except so far as the state process acts are adopted by Congress or by the courts of the United States; that the proceedings on executions in the courts of the United States were to be the same in each state as were used

in the Supreme Court of the state in September, 1789, subject to such alterations and additions as said courts may make; that a state law regulating executions, enacted subsequent to September, 1789, *is not applicable to executions upon judgment rendered by the courts of the United States, unless expressly adopted by the regulations and rules of those courts.* Judge Marshall, in giving the opinion of the court, makes the following remarks upon the origin of the acts of Congress of 1789, 1792–3, page 46: "Congress, at the introduction of the present government, was placed in a peculiar situation. A judicial system was to be prepared, not for a consolidated people, but for distinct societies, already possessing distinct systems, and accustomed to laws which, though originating in the same great principles, had been variously modified. The perplexity arising from this state of things was much augmented by the circumstance that in many of the states the pressure of the moment had produced deviations from the course of administering justice between debtor and creditor, which conflicted not only with the spirit of the constitution, and consequently with the views of the government, but also with what might safely be considered as the permanent policy as well as interest of the states themselves. The new government could neither entirely disregard those circumstances nor consider them as permanent. In adopting the temporary mode of proceeding with executions then prevailing in the several states, it was proper to provide for the return to ancient usage, and just as well as wise principles, which might be expected from those who had yielded to a supposed necessity in departing from them. Congress probably conceived that this object would be best effected by placing in the courts of the Union the power of altering the modes of proceeding in suits at common
405] law, which includes the mode of proceeding in the *execution of their judgments, in the confidence that in the exercise of this power the ancient, permanent, and approved system would be adopted by the courts, at least as soon as it should be resorted to in the several states by their respective legislatures." He held it extravagant and utterly inadmissible to maintain that the practice of the federal courts, and the conduct of their officers, would be indirectly regulated by state legislatures by acts professing to regulate state courts.

And in U. S. Bank *v.* Halstead, 10 Wheat. 64, that court thought that to permit a marshal to be governed or controlled by the state

law, would be not only delaying proceedings against the act of Congress, March 2, 1793, 3 U. S. Laws, 367, but might entirely defeat the effect and operation of the execution, and would be inconsistent with the advancement of justice. The court decided "that the circuit court had authority to alter the form of the process of execution, so as to extend to real as well as personal property; when, by the laws of Kentucky, lands were made subject to like process from the state courts; and, that the act of the general assembly of Kentucky does not operate upon, and bind, and direct the mode in which executions should be enforced by the marshal, so as to prohibit the sale of land levied upon, unless it commanded three-fourths of its value, according to the provisions of said act."

These decisions, taken by themselves, would seem to settle the question, so far as it regards the acts of the Ohio legislature, against the plaintiff; for it will not be pretended, that the law applicable to the acts of Connecticut, or to the execution laws of Kentucky, are not equally applicable to the laws of Ohio of the like nature.

But the Supreme Court, in Waring *v.* Johnson, 1 Pet. 571, say, it has been the uniform course of that court, with respect to the titles to real property, *to apply the same rules that are applied by the state tribunals in like cases.* And in Ross *v.* Doe et al., 1 Pet. 664, it is held, that where a *practice has obtained in a state affecting titles to land*, even if derogatory to the principles of the common law, *the court would regard it, in cases affecting property in such state*, if it did not contravene any act of Congress.

*Mr. Justice Johnston, in delivering the opinion of the [406 court, in Fullerton *v.* Bank of United States, 1 Pet. 612, says: "The district court of Ohio, which was created in 1803, and exercised circuit court jurisdiction, and had power to create a practice for its own government, did not create a system for itself, but finding one established in the state, in the true spirit of the policy pursued by the United States, proceeded to administer justice according to the practice of the state courts; *or in effect adopted, by a single rule, the state system of practice, etc.* So that when the Seventh circuit was established, in the year 1807, the judge of this court, who was assigned to that circuit, found the practice of the state courts adopted, in fact, into the Circuit Court of the United States. It has not been found necessary to make any material alteration since;

but as far as it was found practicable and convenient, the state practice has, by a uniform understanding, been pursued by that court, without having passed any positive rules on the subject." Again, he says: "Written rules are unquestionably to be preferred, because their commencement, and their action, and their meaning are most conveniently determined; but what want of certainty can there be, when a court, by long acquiescence, has established it to be the law of that court, that the state practice shall be their practice, as far as they have the means of carrying it into effect, or until deviated from by positive rules of their own making. Such, we understand, has been the course of the United States court in Ohio for twenty-five years past. The practice may have begun, and probably did begin, in a mistaken construction of the process act; but then it partakes of the authority of adjudication. But there was a higher motive for adopting the provisions of this law into the practice of the court, etc., which must often occur in a court in which the remedy is presented by one sovereign, and the law of the contract by another. It is not easy to draw the line between the remedy and the right, where the remedy constitutes so important a part of the right." "But what is the course of prudence and duty when these cases of difficult distribution as to power and right present themselves? It is to yield rather than encroach; the duty is reciprocal, and will no doubt be met in the 407] spirit of moderation and comity. In the *conflict of power and opinion inseparable from very peculiar relations, cases may occur in which the maintenance of principle, and the administration of justice according to its innate and inseparable attributes, may require a different course, and when such cases do occur, our courts must do their duty; but until then, it is administering justice in the true spirit of the constitution and laws of the United States, to conform, as nearly as practicable, to the administration of justice in the courts of the state."

We are certainly disposed to meet this, as well as every other question, "in the spirit of moderation and comity." It is unquestionably the province of the tribunals of the Union to expound the constitution and laws of the Union as applicable to themselves; and with this it is neither our wish nor purpose to interfere. We shall always feel gratified to find the decisions of those respectable tribunals, upon the grave and important questions before them, in perfect harmony with each other. We have

no desire either to arrogate to ourselves power that does not belong to us, to surrender any that does, or to detract from that of other tribunals. The case in 1 Peters is the only one we believe where the origin of the practice in the United States courts in Ohio is expressly alluded to. We are not aware that any express and positive rule of those courts was ever made, adopting the execution laws of the state and the proceedings under them, as the law of those courts; but the practice of one member of this court for many years at the bar of those courts, gave him opportunity to know that those laws have been repeatedly adjudicated upon in those courts as affecting both original and final process there. Sales upon execution have been, most generally, for years, examined as to their conformity with the state laws, and confirmed or set aside as found to conform. Relying, then, upon the exposition by the Supreme Court of the United States of the practice and proceedings of the circuit court of Ohio, and our own observation of its course of proceeding, we may regard the execution laws of the State of Ohio as adopted into the practice of that court, and as the law thereof. The doubts we have on the subject yield the more readily, where we are only called upon to give to the judgments and proceedings *of the circuit court of the United [408 States the ordinary effect and operations of the judgments and proceedings of our own courts, and to give to the acts of our own legislature effect as the rule of proceeding in the courts of the United States. The profession has almost uniformly acquiesced in the practice of considering the judgments of the circuit court as having the same lien throughout the state that judgments in the state courts have, in the courts where rendered. Strong evidence of this asquiescence is found in the fact that no question of this kind has before been agitated in our courts. Property to an immense amount has changed owners under this practice, and we are disposed to look upon it as a law of property established among us, which is not now to be questioned.

2. The act of February 4, 1826, 22 Ohio L. 114, provides that no judgment theretofore rendered, or which might be thereafter rendered, on which execution had not been taken out and levied before the lapse of a year from the date of the judgment, shall operate as a lien to the prejudice of any other *bona fide* judgment creditor. This act, upon full argument, was determined by this court in McCormick *v.* Alexander, 2 Ohio, 65, to be constitutional

and operative, both as it regarded judgments rendered before and those rendered after its passage. The court has also decided that unless execution issued according to its provisions and was levied within a year after judgment, the lien of the judgment was taken away, as to subsequent *bona fide* judgment creditors who had sued out execution and made a levy. In Patton *v.* Sheriff of Pickaway, 2 Ohio, 395; Earnfit *v.* Winans, 3 Ohio, 136, and Shuee et al. *v.* Ferguson, 3 Ohio, 137, the court decided that where there are several judgments, and the property in question has not been levied on within the year under either of them, they stood on equal footing, and the creditor who first takes out execution and causes a levy to be made, will have the preference. If execution on an older judgment has not been levied within a year on a particular piece of property, and an execution upon a junior judgment has been levied on that property within the year, the junior judgment will 409] have the preference, though a levy *may have been made on the same property under the older judgment before the levy was made upon the junior judgment. The prior lien ceases to bind the subject of it, in all cases where it is displaced by act of the party, or by provision or operation of law. The judgment under which the defendant claims was rendered August 14, 1821, but was not levied on the lots in dispute until February 8, 1826; that under which the plaintiff claims was rendered January 8, 1822, but not levied until August 20, 1823. Neither of them were levied within a year from their date, and no lien was preserved on either by the judgment alone. Each, after the year, depended for preference solely upon execution and levy. The execution under which the plaintiff claims was levied more than two years before that under which the defendant claims, and the priority of the judgment in the circuit court is thus established. The sale to the defendant did indeed vest in him all the right of the judgment debtor, but that right was subject to the lien on the execution from the United States Circuit Court.

The defendants insist that the *venditioni* upon which the sale to the plaintiff was made, is void because it has no *fi. fa.* and levy upon which it is predicated. This position is based upon a variance in the amount stated in the *vendi.* from that of the recovery in the circuit court. Without explanation this objection might avail the party; but in the case in hearing the objection is entirely removed by the agreed case. By this it is admitted that

the *vendi.* was issued upon the same judgment on which the levy was made.

In case the claim of the plaintiff is sustained the defendants claim compensation for improvements under the occupying claimant laws. This claim is well founded. The defendants are possessed without bond under a judicial sale, and against this the plaintiff sets up a better title. The defendants have a right to compensation for improvements made before suit brought.

The court find the defendant guilty of the trespass, etc., and assess the plaintiff's damage to six cents; but in order to draw a jury to assess the value of the improvements, the cause is ordered to be continued in the county of Warren.

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*LESSEE OF WILLIAM SELLERS *v.* CORWIN AND BENHAM. [410

SAME PLAINTIFF *v.* CORWIN.

THESE were cases in ejectment, reserved from Warren county, which were submitted to the court upon the same agreement as in the preceding case. They depend on the same principles and facts, but relate to different property, and are decided as above.

WILLIAM AND JOHN HOGG *v.* ZANESVILLE CANAL AND MANUFACTURING COMPANY.

Where a dam is erected across a stream that is navigable within the terms of the ordinance, though the erection of the dam was authorized by the legislature, upon certain terms and conditions, if loss be sustained by navigators in consequence of the dam, the owners are responsible, though all diligence was used to prevent the dam creating obstruction to the navigation.

A dam erected across a navigable stream, under the sanction of a legislative act, if not kept in the condition required by that act, may be regarded as a nuisance, and persons injured may maintain an action as in the case of injury by a nuisance.

Declaration alleging that boat was wrecked in passing over the dam, proof that in crossing the dam the boat was rendered unmanageable and was wrecked upon the pier of the bridge below, no variance.

In actions for torts the jury may calculate interest on the damages actually sustained and add it to their verdict.

THIS case was reserved in the county of Muskingum.

The declaration contains two counts:

The first count sets forth that the Muskingum river is a navigable stream, and a common highway for all citizens. That at or near the town of Zanesville there was a certain dam across the river, and a lock, through which lock it was the right of all citizens to pass free of expense and without delay. That by a certain act of the legislature of Ohio, of February 24, 1816, the defendants were required, within one year therefrom, to erect said dam and lock agreeably to an act in favor of John McIntyre and his associates, passed February 21, 1812, by which last-named act the dam and lock were particularly authorized and described; and the proprietors required, at all times, to keep said lock in good repair, and upon application to open said lock without delay or expense. And should they so *erect* said works, or suffer the same to get *out of repair*, as that the convenient navigation of the river should be *impeded* or rendered *dangerous*, that they should be liable to the civil action of any person injured. That the said plaintiffs, on April 29, 1828, were possessed of a certain Orleans boat and loading, and were passing down said river and wishing to pass through 411] *said lock, applied to and requested the defendants to pass through without delay, etc. That the defendents have availed themselves of the privileges of said acts and assumed the obligations therein required. That the waters of the river were, at the time, sufficiently deep to pass a loaded boat over the ripple. Yet the defendants, well knowing, etc., although, etc., did not nor would not open the said locks, but wholly neglected and refused; by means whereof the said plaintiffs were obliged to pass over said dam of defendants, and by means whereof the navigation of said river was *impeded* and *rendered dangerous*, and in so passing the boat was wrecked, etc.

The second count recites that the Muskingum is a navigable stream, emptying through the Ohio into the Mississippi, and a common highway, and that the defendants have built a dam across

said river, and obstructed and rendered dangerous the navigation; that the plaintiffs, being citizens, etc., on April 29, 1828, had a right to navigate and pass along said river, etc.; that the defendants, well knowing, etc., with intent to injure, etc., did erect said dam and obstruct, etc., and in passing down said river with a certain Orleans boat and loading, plaintiffs were constrained to pass their said boat over the said dam of the defendants, by means whereof the said boat was wrecked and lost, etc.

Plea, not guilty.

On the trial of the cause it was proven that, in February or March, 1828, a boat of the plaintiffs, with valuable loading, was passing down the Muskingum river from some of its head waters, under the care of one Rogers as supercargo; that when arriving at a point one mile or more above the dam of the defendants the boat was stopped in order to ascertain whether it would be passed through the lock. Upon examination, it was found that the lock was so filled and blocked up with sand and drift wood that it could not be opened, and that there was no prospect of opening it until the water should fall. This drift wood and sand had accumulated in and about the lock in consequence of the unusually high state of the water in January and February of that year. There was evidence to show that the wing dam and the main dam were not of the same height, the consequence of which was *to create [412 a strong counter current at the angle made by the junction of the two. The tendency of this counter current was to increase the accumulation of sand and drift about the lock.

It being impossible to pass the boat through the lock, it was concluded to go over the dam, and Rogers employed two skillful and experienced pilots and boatmen to take charge of the boat, and having taken out as much of the loading as was deemed necessary to enable the boat to pass over the dam, and the pilots having made such other arrangements as they deemed necessary, started with the boat from a point higher up the river than they had been accustomed to start from when taking boats over the dam, with a view of getting as far out into the river as possible. A strong wind was blowing from the west, which was believed to have prevented them from getting as far out into the river as could have been wished, and they crossed the dam near the angle made by the wing dam. The counter current before alluded to turned the boat upon its broadside, and in that situation it went over the

dam. Although every exertion was made, they were not able to right her until she struck against the pier of a bridge, some little distance below, and was stove in pieces. That the piers of the bridge were ninety feet apart, and the boat might have passed in safety had it not been for the dam.

It was in consequence of the misdirection given to the boat by the counter current on the dam that the boat struck the bridge. But for the dam the navigation would have been safe. It would have been more safe could the boat have passed over the dam at a point further west, but with every exertion a point further west could not be reached. One of the boatmen thought it possible that the stern might have been thrown down the river, and the boat righted in that way in time to save it, but the pilot, who had the chief command, thought otherwise. Not more than twenty seconds intervened between the passing of the dam and striking the pier. On cross-examination one of the boatmen stated that a man of ordinary care would not, in his opinion, have taken the boat over the dam, at that stage of water, with so much loading; had it been his boat he should have delayed until the lock could 413] have been opened, or taken out all the loading *and gone with the boat empty. It appeared, however, that it was not an unusual thing to pass boats over the dam. It was also proved that the load could all have been taken out and hauled round the obstruction, reloaded below, and the empty boat taken over the dam at a comparatively small expense and loss of time.

The Muskingum river was proved to be navigable, and there was evidence to show that previous to the erection of the dam, at the same stage of water with that at the time the accident happened, it was a smooth sheet, and that the boat was managed as well as could be done.

There was also proof in the case that the dam and lock were constructed substantially according to the description contained in the acts of incorporation, etc. The lock sometimes got out of order, and was sometimes injured by high water. A slope had been originally constructed at the junction of the wing and the dam, as required by the act of 1812, but was carried off by high water during the first year. It was also in proof that the lock was cleaned at as early a day after the subsiding of the high water as possible, and that a second boat of the plaintiff's, which came

down the river three or four weeks later, passed through the lock in safety.

It was agreed on trial that the defendants were an incorporated company, and were authorized by the law of Ohio to erect a dam and lock in the place where this was, and that the lock, at the time of the arrival of this boat, was not opened, and could not be by reason of the drift, etc.

The following acts of assembly were read and considered to be in evidence:

An act to enable John McIntyre and his associates to erect a dam across the Muskingum river, passed February 21, 1812.

An act to incorporate the stockholders of the Zanesville Canal and Manufacturing Company, passed February 24, 1816.

An act to amend the act entitled "an act to enable John McIntyre and his associates to erect a dam across the Muskingum river," passed January 27, 1823.

The case was finally submitted to the jury for the assessment of damages, subject to the opinion of the court on the questions at law arising in it.

*The jury returned a verdict for the plaintiff, and assessed [414 damages at one thousand six hundred and seventy-one dollars, the actual loss sustained, together with four hundred and sixty-five dollars and seventy-seven cents interest on the same, amounting in the whole to the sum of two thousand one hundred and thirty-six dollars and seventy-seven cents.

The case was argued at great length by Culbertson, Goodenow, and H. B. Curtiss, for the plaintiffs, and by Goddard, Stillwell, and Spangler, for the defendants.

It was deemed unnecessary, however, to insert the arguments, as the points made are, so far as they relate to the principle upon which the case is decided, referred to in the opinion of the court.

Judge HITCHCOCK delivered the opinion of the court:

The two leading questions which require the consideration of the court are:

1. From the facts disclosed in this case have the plaintiffs a right of action against the defendants?

2. If they have such right of action, then can they in this form of action recover?

That the plaintiffs have sustained a loss is clear, and it would

seem to be equally clear that this loss was sustained in consequence of the erection of the dam by the defendants. It is also clear that the plaintiffs had the right of the free navigation of the Muskingum river; and if obstructed in the exercise of this right by any individual or individuals, without lawful authority, they are entitled to a compensation in damages.

The defendants insist, however, that they are protected under the several acts of the legislature which were read to the jury and considered in evidence.

The first of these acts is found in 10 Ohio Statutes, 173. It commences by setting forth in a preamble that, "whereas it has been represented to this general assembly by John McIntyre and his associates, that by erecting a dam across the Muskingum river, at a certain point above its confluence with the Licking creek, and conducting the water by a canal to a point below the falls of said Muskingum river, very great advantage for water-works can be 415] secured, and the navigation of said river very *much improved." The preamble then goes on to state that McIntyre and his associates have applied to the general assembly to have a special law passed authorizing them to construct a dam and canal as aforesaid, upon such terms as shall be deemed just and reasonable.

I have been thus particular in noticing the preamble, for although it is no part of the statute it furnishes the means by which it may be construed. It is a true indication of the intention of the legislature. This intention was not to *obstruct*, but to *improve* the navigation of the Muskingum river. Acting as the guardian of the public weal, they supposed they possessed this power. Had it been supposed that the navigation would have been in the least obstructed, it is not probable that any legislative action would have taken place. McIntyre and his associates represented that the navigation would be improved, and at the same time great advantages of water-works secured. If this double object could be obtained, it was desirable it should be. Having this in view, the act was passed.

By its provisions, McIntyre and his associates are authorized to erect a dam. The place where, and the manner in which it is to be built, are pointed out. They are required to build a slope and keep the same in repair, and also construct a lock through which boats may be passed with safety, and "without delay to open said

lock," that persons wishing to pass through "may pass free of expense." Throughout the whole act the legislature seem to have been particularly cautious to secure the free navigation of the river. So that that could be done, they were willing that McIntyre and associates should take to themselves the advantage of all water power for propelling machinery. And that there might be no mistake, no room for controversy, they close the statute with the following proviso: "That if *at any time* the said John and his associates, or his or their legal representatives, should *so erect* said works, or suffer the same to get *so out of repair* as that the convenient navigation of said river should be in anywise impeded or rendered dangerous, the said John and his associates, or his or their legal representatives, shall be liable to the civil action of any person injured."

*By the act of February 24, 1816, 14 Ohio L. 293, the asso- [416
ciates of John McIntyre are incorporated by the name of the "Zanesville Canal and Manufacturing Company." All the privileges and immunities conferred upon McIntyre and his associates, by the act of 1812, are conferred, and all their duties are imposed, upon this company, except that the company are to complete the lock in one year and the canal in ten years.

The third act read in evidence makes no material change so far as respects the case under consideration, unless in that clause which inflicts a penalty of ten dollars per day for each day any person may be obstructed from passing through the lock. To the validity of these statutes, as affording a protection to the defendants, the plaintiffs object on the ground that they interfere with the "ordinance for the government of the territory of the United States northwest of the river Ohio." Ohio L. L. 252. Article 4, page 256, contains this clause: "The navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways, and forever free, as well to the inhabitants of said territory as to the citizens of the United States and those of any other state that may be admitted into the confederacy, without any tax, impost, or duty therefor." This portion of the ordinance of 1787 is as much obligatory upon the State of Ohio as our own constitution. In truth, it is more; for the constitution may be altered by the people of the state, while this can not be altered without the assent both of the people of this state and of the United States through their representatives.

It is an article of compact, and until we assume the principle that the sovereign power of the state is not bound by compact, this clause must be considered obligatory. Certain "navigable rivers" in Ohio are "*common highways.*" Of this character is the Muskingum river. Every citizen of the United States has a perfect right to its free navigation. A right derived, not from the legislature of Ohio, but from a superior source. With this right the legislature can not interfere. In other words, they can not, by any law which they may pass, impede or obstruct the navigation of this river. That which they can not do directly they can not 417] *do indirectly. If they have not themselves the power to obstruct or impede the navigation, they can not confer this favor upon an individual or a corporation. But it does not follow that laws may not be enacted to improve the navigation of these rivers. Nor does it follow that their waters may not be used for hydraulic purposes, where it can be done without injury to the navigation.

In passing laws to improve the navigation, care should be taken that that which was intended as an improvement shall not operate as an obstruction. The legislature, in enacting the law of 1812, seem to have been influenced by these considerations. They understood well their own power and the rights of the citizens. They grant the license prayed for, but they annex to it the condition contained in the proviso before recited. In effect, they say to McIntyre and his associates, you may build your dam, construct your lock and canal. You shall do it in a particular manner. But you do it at your own peril. If you "*so erect* said works, or suffer the same to get so *out of repair*, as that the convenient navigation of said river should be, in *any wise*, impeded or rendered dangerous," this act shall not screen you; you "shall be liable to the civil action of any person injured." In this view of the statute, and it seems to me this is the proper construction, it is not inconsistent with the ordinance. If, however, the statute is to be regarded as an absolute grant of the right to erect these works, although the erection should obstruct or materially interfere with the navigation, it would clearly interfere with the ordinance. Every legislative act ought, if possible, to receive a construction consistent with the constitution. For it is not to be supposed that this body would intentionally violate that instrument. Should they, however, do it, their act would be void, and of no binding efficacy.

The counsel for defendants contend that if the legislature had the power to pass this law, or to make the *grant*, as they term it, the defendants can not be answerable for the consequences. That the only proper inquiry is, have the defendants complied with the requisitions of the act. This is giving to the act an effect beyond that intended by the legislature, for, as we have already seen, by the proviso at the close, *McIntyre and his associates were [418 to be liable, if the erection should prove injurious to the navigation. Let it be remembnred that the public interest was not the sole or principal object in view with those persons. Their great object was to acquire the control of the water power. In order to do this, they were willing to undertake that the navigation should not be obstructed, or if it was, that they would be answerable for the consequences.

Besides, were we to carry out the argument of defendants' counsel, what would be the consequence? Even had these works, instead of improving the navigation, impeded or entirely obstructed it, yet the defendants would have been protected. And thus the effect of the ordinance would have been entirely defeated.

It is further urged by the defendants' counsel, that the plaintiffs can not recover in this case, because, as they allege, it was owing to want of care on their part, and on the part of those whom they employed, that the property was lost. And the case of Butterfield *v.* Forrest, 11 East, 60, is cited. The case is not without difficulty upon this point. If it was through the carelessness of the plaintiffs that the property was lost, although in consequence of an obstruction created by the defendants, still the defendants ought not to be answerable. If an individual will voluntarily cast himself upon an obstruction of this character, when he can, by ordinary care, avoid it, if he sustains an injury it is in consequence of his own folly and he must bear it. This was a question peculiarly proper for the consideration of a jury. It does not seem to have been much considered upon the circuit. So little so, in fact, that the parties agreed to let the jury assess the damages, without inquiring particularly into the facts of the case, leaving it for the court to settle the law. Had the jury, upon an examination of all the facts, returned a general verdict for the plaintiffs, a new trial would not have been granted upon this part of the case, unless, in the opinion of the court, that verdict was against the evidence. As it is, this is, in truth, the only proper

point of view in which to consider it. If, from the evidence, the jury might, with propriety, have found for the plaintiffs, then the verdict should not be disturbed.

419] *From the evidence, then, it appears that when the lock was out of repair, people were in the habit of passing boats over the dam. That the plaintiffs employed two experienced pilots to manage their boat. That the boat passed over, but not in a proper direction, owing to the counter current. That every effort was made within the power of those on board to save her, but in vain. In consequence of the direction given to her by the counter current, she was forced against the pier of the bridge and lost. And that but for the dam, she would have passed down in safety. One of the pilots stated that, in his opinion, "an ordinarily careful man would not have taken the boat over the dam at that time, with that amount of loading. Had it have been his boat he would have either delayed, until the lock could have been opened, or he would have taken out all the loading and gone with the boat empty." Whether this *opinion* was communicated to the supercargo of the boat does not appear. With these facts before them, might not the jury have inferred that the loss was in consequence of the dam, and not through the negligence or willful presumption of the plaintiffs or their agents? At the trial it did appear to me that the jury not only might, but that they ought to, make this inference. That there was more danger in passing this dam than in the ordinary navigation of the river, there can be no doubt. In consequence of this increased danger, the plaintiffs, or rather their agents, employed, not only one, but two experienced pilots, residents in the neighborhood, and well acquainted with all the difficulties. What more could have been required of them? True, one of these pilots *now* says that he thinks it was imprudent. Whether this was an opinion formed at the time, or whether it was formed subsequent *to*, and in consequence *of*, the disaster, does not appear. From the apparent and acknowledged character of the witness, I should incline to the opinion that the latter was the case. Had it been previously formed, it would have been communicated to the agent of the plaintiffs. And if communicated, the experienced counsel of the defendants would not have failed to have had a fact so material in evidence. All these circumstances evidenced, the court are of opinion that there

*was not that want of ordinary care in the plaintiffs which [420 ought to induce a jury to find against them.

It is again insisted that the defendants can not be made liable in this case, because the case shows that they made use of *sufficient* care and diligence to keep their works in repair. And that it was owing to the act of Providence, to the successive floods, and the peculiar nature of the season, that they were not able, at this time, to open the lock. To me, it seems that in this particular they err, in consequence of mistaking the true nature and effect of the authority, grant, or license under which they assumed to act in the erection of the dam and other works. If from the erection of the works, or in consequence of their being out of repair, "the navigation of said river should be in *anywise* impeded or rendered dangerous," the act does not protect them. No matter as to the cause. Before they engaged in this business, they knew the condition, and were willing to assume the responsibility. To decide differently, would be to decide that the legislature had the right to confer upon others the privilege of obstructing in *some measure*, and *for a time*, a navigation, to the free enjoyment of which the ordinance intended to secure a right in each and every citizen of the United States.

To sustain them on this ground of defense, counsel have referred to the case of Townsend *v.* The President, etc., of the Susquehannah Turnpike Road, 6 Johns. 90. But there is a clear and manifest distinction between that case and the one before the court. A turnpike company construct a road, and from travelers they receive toll. It is intended for the double purpose of accommodating the public and of securing to the company pecuniary gain. In such case, if, through the neglect of the company, the road gets out of repair, in consequence of which an individual sustains a loss, it is right that the company should remunerate him. But if care and diligence is exercised to keep the road in repair, it would be wrong to make them liable.

How is the case before the court? Here was a public highway, made, not by the "Zanesville Canal and Manufacturing Company," but by the Supreme Creator of all things. The plaintiffs had a right secured to them, by the supreme law of the land, to travel this highway, and to transport their property *upon [421 it, without the let or hindrance of any man or body of men. This right was obstructed by the defendants, or in consequence of their

acts originally done. This obstruction they, at the time, would have been glad to have removed, and made efforts to remove, but could not, owing to circumstances not within their control. But they voluntarily erected the works which were the first cause of the obstruction, and must be liable for all consequences. It may be a hard case for them, but it would be equally, nay, more hard, to throw the risk upon those whose constitutional rights, secured by compact, had been interfered with.

After mature deliberation, and after full consideration of all the facts, the court are unanimous in the opinion that the plaintiffs have a right of action against the defendants.

The next question to be considered is, whether the plaintiffs can recover in this form of action? The declaration contains two counts.

The first was intended to be framed under the statute, but owing to some difficulty about the proof, this was abandoned on the trial.

The second is a count for a common nuisance.

There is some controversy between the counsel as to whether the first count was or was not abandoned; but according to the recollection of the judges who heard the case upon the circuit, this was done. Subsequently some evidence was introduced which might have conduced to sustain this count, but ought not to be considered under the circumstances.

The real question then is, does the evidence sustain the second count?

Had there been no legislative action upon the subject, there can be no doubt but the dam of the defendants was a common nuisance. Such is the character of every unlawful obstruction of a public highway, whether that highway be by water or by land. But the defendants' counsel contend, inasmuch as these works were erected in pursuance of a legislative act, that under no circumstances could they be treated as a common nuisance. But that if a person sustained an injury in consequence of their erection or being out of repair, compensation must be recovered, either under the act of 1823, for delay, or under the act of 1812, 422] for *improperly erecting the dam and lock, or for suffering the same to get out of repair.

The act of 1823 gives to the party delayed a penalty of ten dollars for every day's delay, to be recovered against the corporation.

It never could have been the intention of the legislature, that this should be the only remedy which a party aggrieved might have. Or if such was the intention it was one which no court could consistently regard. It would be granting to the legislature the power to grant an individual or a corporation the privilege or right of obstructing the navigation of a river upon the payment of this penalty to a person injured. The question is not whether the penalty would be sufficient, but whether the legislature possess the power. To me it seems clear they do not.

And it is equally clear that the penalty in some cases would, in fact, be no compensation. It is well known that the navigable rivers which empty into the Ohio, and through it into the Mississippi, can only be navigated in particular stages of water. The farmer or other citizen who would adopt this mode of conveyance to transport his property to market, must embrace the opportunity when a proper stage of water will enable him to proceed, and the delay for a single day might cause a delay for weeks and perhaps for months. These plaintiffs might have delayed until the lock could be opened, and have recovered this penalty, but they were not bound to do it. To require it in all cases might, and probably would in *some*, prove ruinous.

If a plaintiff do not go for the penalty, is it necessary that he should predicate his action upon the statute, and claim damages on the ground that the dam and lock were improperly erected or that the same were suffered to get out of repair? He may do this, and perhaps it would be the more proper mode of proceeding, but in my view of the law it is not absolutely necessary that he should.

The right to navigate the river is a right secured to the citizen by the ordinance of 1787. It is a right of which he can not be deprived unless by agreement between the people of the United States, through their representatives in Congress, and the people of Ohio, through their *representatives in the general [423 assembly. This right has been violated by the defendants, and they seek to protect themselves under a law of the state. Under this law they are protected as long as the navigation of the river remains unobstructed, but so soon as in consequence of their works it becomes obstructed, the law ceases to protect them.

Without the law this dam would be a nuisance. But under the law it is no nuisance so long as the lock remains in a situation that boats may be passed through, because the navigation is not ob-

structed. But so soon as it is out of repair so that boats can not be passed through, it becomes a nuisance because the navigation is obstructed. It is only upon condition that the navigation is at *all* times kept open, that the defendants can protect themselves under the statute. Upon this point, although one member of the court doubts, still a majority believe the action is well brought.

It is objected further to the recovery, that admitting the action to be well brought, still the proof is variant from and does not sustain the declaration. The allegation in the declaration is, that the plaintiffs "were constrained to pass their said boat, loaded as aforesaid, over the said dam of the said defendants, by means whereof the boat was wrecked," etc. The evidence shows that the boat was not wrecked immediately upon the dam, or in passing, but that she held together until she struck the pier of the bridge. Although the evidence is clear that the dam was the cause of the loss, it is urged that the fact that the boat was driven against the bridge should have been stated, and that the loss did not happen in the manner set forth in the declaration. To say the least, this exception is extremely technical. What was the cause of the loss of the boat? The testimony in the case answers the question. It was the dam. And whether the boat was actually wrecked while upon the dam, or immediately after by striking against a rock, a log, or the pier of a bridge, is immaterial. The charge is made with sufficient precision to give all necessary notice to the defendants, and is sufficiently sustained by the evidence.

Another question made in this case is, whether the plaintiffs are entitled to receive interest upon the value of the property lost, the 424] jury having found the value of that property, *and also the amount of interest. So far as respects the plaintiffs there is nothing unjust in this. They have been deprived of this property from which they might have made gain, equivalent, or more than equivalent to the interest. But interest is allowed, not only on account of the loss which a creditor may be supposed to have sustained by being deprived of the use of his money, but on account of the gain made from its use by the debtor. The law connected with the subject is peculiarly applicable to those who stand in the relation of creditor and debtor. The statute of this state fixes the rate of interest at six per cent., but it has explicit reference to this relation of creditor and debtor. In actions of trespass, trover, or case where property was the subject matter of dispute, I have always supposed

the value of the property taken or destroyed was the rule of damage. The jury in assessing damages might take into consideration the length of time that a person had been deprived of his property in assessing these damages, and the court would not be disposed to interfere. But to compute interest, as such, I had considered not allowable. This has been done in the present case, with a view to submit the question of law to the court. My own opinion is that this interest ought not to be allowed, and that the recovery should be for the value of the property only. In this, however, the other members of the court differ from me, and think that the interest is a proper item of charge against the defendants. And were it not that I have long considered the principles of law to be different, I should concur with them; for even with this the plaintiffs will receive but an inadequate consideration for the loss actually sustained.

Judgment will be entered upon the verdict in favor of the plaintiffs, for the sum of two thousand one hundred and thirty-six dollars and seventy-seven cents, the value of the boat and loading lost, together with the interest as returned by the jury.

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*Jacob Welsh v. Rezin Welsh. [425

Where, under a parol contract for land indefinite in its terms, a party enters into possession, and makes large improvements, for his own use and account, and is dispossessed by the vendor, he can not recover for his labor in an action of *assumpsit* at law; but must seek relief in equity.

This case was reserved in the county of Jefferson, upon a motion to set aside a nonsuit and order a new trial.

It was an action of assumpsit for work, labor, etc., and the declaration contains three counts:

1. For work and labor in and about the erection of a certain fulling mill and carding machine for the defendant at his request, and for materials found. 2. For work and labor in and about the erection and building a certain fulling mill and carding machine for the defendant, and also for materials found, and also for boarding, lodging, victuals, and drink furnished by the plaintiff to the defendant for himself, his laborers, etc., at his like request.

3. For money paid, laid out, and expended by the plaintiff for the defendant's use, and also for money had and received by the defendant to the plaintiff's use.

The declaration contains no special count.

The counsel for the plaintiff, in opening the cause to the jury, stated the facts which he expected to prove, and upon which he should rely for a recovery. Evidence was offered to prove these facts, but was objected to by the defendant, and the objection sustained by the court, and a nonsuit ordered.

The plaintiff, by his counsel, then moved the court to set aside the nonsuit and order a new trial.

The facts which the plaintiff offered to prove were the following: A parol agreement was made between the plaintiff and defendant (they being brothers), that the plaintiff should grant to the defendant by lease or purchase, as should subsequently be agreed between them, a piece of land, being mostly wild, of about five acres, for the purpose of the plaintiff's erecting a fulling mill and other necessary buildings, to carry on the business of dyeing, fulling, and manufacturing cloth, etc. In pursuance of this agreement the defendant gave the plaintiff possession of said land, and the plaintiff went on and erected, with the knowledge and permission of the defendant, a fulling mill and other buildings appurtenant thereunto, and a dwelling house, stable, etc., to a large 426] *amount, say one thousand dollars. After these things were done by the plaintiff, the defendant sold and conveyed away the said land, with all the erections and buildings, without the consent or knowledge of the plaintiff, turned him out of possession and put his grantee in, and put in his own pocket the entire avails of the labor, money, and expenses of the plaintiff on the said premises.

Goodenow, for the plaintiff, insisted that upon these facts being proven, the plaintiff would unquestionably have a right to recover.

Here was a contract between the parties which had been put an end to by the defendant, by his putting it out of his power to comply with it. And whenever a contract or purchase was rescinded in consequence of an act of the vendor, the vendee might recover back the money or other property paid, or for the labor expended upon the thing sold, in an action of assumpsit, declaring in the common counts. To sustain his points he cited the

following, among other authorities: 12 Johns. 274; 11 Wheat. 451, 451; 7 Term, 177; 1 Ohio, 363; 4 East, 291; 5 East, 449; 5 Johns. 85, 272. These cases all have reference to the doctrine of rescinding contracts.

He further stated, if the question is *what damages* have been sustained, you must declare upon the special contract. If you go for the original consideration paid you *rescind*, and may rely on the common counts. 1 Term, 133.

D. L. COLLIER, for the defendant, did not controvert the principle contended for by the plaintiff's counsel, that where a vendee had the right to rescind a contract, he might elect to take that course, and recover back in this form of action the money paid, or the value of other property paid, or even for work and labor done and performed in the pursuance of the contract. But he insisted that that principle could not apply in the present case. The work and labor was not done in pursuance of the contract; it was not done in part payment for the land; it was not done for the use of the defendant, but for the use of the plaintiff himself. If the plaintiff can *recover anything, it must be damages [427 for the non-performance of the contract, and damages can be recovered only in an action upon the contract. 1 Term, 133.

He further argued that the authorities cited by the opposite counsel were not applicable to the present case unless those cited from 5 Johnson were, and that these were clearly in favor of the defense.

Judge HITCHCOCK delivered the opinion of the court:

The question for the consideration of the court is whether, upon the proof of the facts stated, the plaintiff would have a right to recover in *this form* of action.

The contract or agreement stated by the plaintiff's counsel is one of no ordinary character. It is not one by which the parties agree to sell or lease land, but that they will, at some future period, agree that one or the other shall be done. The terms are not specified, but are left for future arrangement. No price is fixed, no length of time for which a lease shall run, should a lease be agreed upon, no time in which payment shall be made. Nothing, in fact, but that the plaintiff shall go into possession, proceed with his works, and subsequently all shall be made right.

The reason why the business was thus transacted is to be found probably in the fact that the parties were brothers. But notwithstanding the loose manner in which this agreement was made, I can not doubt that a court of chancery would compel the defendant to do justice. The circumstance that there was no writing could make no difference in such court. Possession was taken of the land, labor was performed, money expended, and it would be a fraud on the part of the defendant not to comply with the contract. The statute was made not to *encourage* but to *prevent* frauds.

It does not follow, of course, that because chancery *might* relieve in a case like the present, therefore that law *will* in an action of assumpsit.

This action is founded upon the supposition that there was a contract which the plaintiff had a right to rescind in consequence of the conduct of the defendant. From the facts proposed to be 428] proved, there can be no doubt the plaintiff *had a right to rescind this contract. The defendant had put it out of his power to comply by disposing of the property to a third person. After this he could not hold the plaintiff to fulfill on his part. But what right accrues to the plaintiff by rescinding? The law is well settled that where a vendee has a right in consequence of the conduct of the vendor to rescind, he may do it and recover back, in an action for money had and received, the amount paid upon the contract. 1 Term, 133; 5 Johns. 85. Upon this point there is no controversy. The principle is admitted by the defendant's counsel. It would be immaterial whether the payment was made in money, or made in merchandise, or in work and labor. In either case the amount paid might be received; and upon the principle that the consideration for which the payment was made had failed.

In the present case the object is not, however, to recover for anything which was paid upon the contract, for nothing was paid. It is to recover for work and labor done by the plaintiff for his own use and benefit while he was in possession of the property. A payment made to a vendor is for *his* benefit. But when this labor was performed it was not for the benefit of the vendor, nor supposed to be for his benefit. It was done with his knowledge and approbation, but intended alone for the use of the plaintiff. Although done with the knowledge of the vendor, it was not done

even at his request. I can not see, then, upon what reason the principle which authorizes a vendee to recover back money paid upon a contract which is afterward rescinded, can be applied to this case. It seems clear that it is an effort to extend this principle to a new class of cases. No authority precisely in point has been cited, and I presume no one favorable to the plaintiff's claim can be found. The case of Gillett, Adm'r of Clemens, *v.* Maynard, 5 Johns. 85, is somewhat analogous to the one now before the court. In that case, however, money had been paid upon the contract, and the action was brought, not only to recover back this money, but also to receive pay for the improvements made while the intestate was in possession of the land. It was held by the court that the contract being rescinded, the plaintiff was entitled to recover back the money paid, with interest, but not any damages for *the labor he had bestowed, or the improvements [429 he had made. Upon this part of the case the court say: "The plaintiff, however, ought not to have received any compensation for the improvements. There was no express or implied undertaking by the defendant to pay for them. When the work was done by the intestate it was for his own benefit; and if he voluntarily abandoned his contract, without any stipulation for the improvements, he must be deemed to have waived all claim to them." From the latter clause counsel infer that if the plaintiff's intestate had not *abandoned* the contract, he might have recovered compensation for the improvements. Upon an examination of the case, however, I see no evidence of abandonment except the death of the vendee, unless the circumstance of suing to recover back the money paid, furnishes this evidence. If the case of Gillett *v.* Maynard be law, I think it must be decisive of this case. Here the work, when done, was done for the plaintiff's benefit. There is no proof of any express promise, nor is there any implied promise on the part of the defendant to pay for it.

Further, the counsel for the plaintiff says: "If the question is *what damages* have been sustained, you *must* declare on the *special contract;* if you go for the original consideration paid, you *rescind* and *may rely* on the common counts," and in support of this position cites Towers *v.* Burrel, 1 Term, 133. Apply this principle to the present case, and it defeats the action. The plaintiff does not "go for the original compensation paid," for no such consideration was paid. The real object is to recover compensation in damages for

the labor performed. The plaintiff seeks to rescind the contract, and then to recover over and beyond what, according to the rules of law, as I have heretofore understood them, he has a right to recover upon that rescission. And no good reason can be assigned why he might not, with equal propriety, recover to any extent damages which he may have sustained in consequence of the failure of the contract.

Had there been any express promise proven to pay for these improvements, the case would have been different. I conceive that there would be a moral obligation to constitute a sufficient consideration for such promise. The Supreme Court of the State 430] of New York, in the case of *Frew v. Hardenburgh, 5 Johns. 272, hold differently. But in that case the plaintiff took possession of the land without the consent of the defendant, and held that possession until ousted by an action of ejectment. As there is no express, so neither is there anything from which to imply a promise, unless we establish the broad principle that where there is a contract for the sale of land, and the contract fails in consequence of an act of the vendor, the vendee can recover pay for the improvements made, in an action for work and labor. I am not willing to establish this principle. It is not necessary for the furtherance of justice. The law provided a complete and adequate remedy in an action upon the contract; and I can not consent to give a new remedy for the purpose of saving this action.

No difference can be made in conseqence of this contract having been by parol. This is not the fault of the law but of the parties. If the plaintiff has been improvident in entering into the contract, the court can not with propriety change any known rule of law to help him out of his difficulty.

I am aware that it is said that the action of assumpsit is as broad as a bill of equity. But it does not follow that if a plaintiff could have redress in a court of equity, he can therefore have redress in a court of law, provided he sues in assumpsit. Nor does it follow that because a plaintiff has an equitable claim against the defendant, he can enforce this claim if he sues in assumpsit. If he prosecutes his suit in a court of law, he must in assumpsit, as well as any other form of action, show that he has a *legal right* of action. When this is shown, the action will be governed by equitable principles.

As it would seem to be just that the plaintiff should receive a

compensation for his improvements, we have reflected whether he might not recover upon the money counts, upon the ground that the defendant had received money for the improvements made by plaintiff, with which he might be charged as having received it to his use. But in this view of the case there is great, and, as it appears to me, insuperable difficulty.

The interest of the plaintiff in the premises is an equitable *interest. Of this interest the defendant could not deprive [431 him unless with his own consent. The legal estate alone was in the defendant, and if he transferred the land, it must be subject to the plaintiff's equity, especially if transferred to a person having notice of this equity. Now the case shows that when this land was sold the plaintiff was in possession. The purchaser, then, must be chargeable with notice of all his rights. If so, then this equity may still be enforced. The plaintiff has been deprived of nothing but the possession, and to be restored to this, he must apply to the proper tribunal in the proper way. He may apply to a court of chancery for a specific performance of the contract, and if there has been no laches on his part I see no difficulty in his obtaining a decree, either in a specific performance, or for a compensation, as the merits of the case when presented may seem to require.

Upon the whole a majority of the court are of opinion that the nonsuit was properly ordered, and that the plaintiff take nothing by his motion.

WRIGHT, J.

My opinion does not accord with that of my brethren in this case. If the evidence offered was admissible under the issue, the nonsuit should be set aside. It is admissible if it tend to prove the issue. The declaration is for *work*, etc., in building a fulling mill, etc., for the defendant, for board, etc., furnished and paid for self and hands, for labor generally, for money paid and had and received, and on account stated. Issue is taken upon *non assumpsit.*

The plaintiff offered to prove that the defendant agreed with him to grant him, on a lease or purchase, as should be subsequently settled between them, about five acres of land, for the purpose of erecting a fulling mill, etc., and other buildings for manufacturing cotton, and put the plaintiff into possession under the agreement; and that the plaintiff built, with the knowledge and permission

of the defendant, the mill, and other buildings to the value of one thousand dollars, which he paid two workmen for; when the 432] *defendant without the consent or knowledge of the plaintiff sold the land and improvement, received the pay for them, turned the plaintiff out of possession, and put the purchaser in. The labor and expenditures by the plaintiff were on the defendant's land. A jury would be warranted in inferring from the fact of the work being so done, that it was done for the defendant, and to oblige him to pay what they were worth. The evidence offered conduced directly to prove the issue, and should have been received. Whether the work was done and the money paid under a special agreement, which was open and subsisting, was a matter of fact to be proven before the jury. The ability to prove that state of things would not have the effect to exclude evidence proper when offered. That there had been a special contract between the parties upon the subject of the suit, would not destroy the right to recover, in the common counts, unless open and subsisting, and the suit were to recover damages arising out of a breach of the contract. But when a defendant refuses to execute a special contract, he is not permitted to set up that as a pretext for retaining what he has received in payments under it; in such cases the plaintiff may hold the contract abandoned and recover on the common counts. 12 Johns. 275; 7 Johns. 132; 1 Ohio, 363; 7 Term, 177.

So where defendant has been guilty of fraud as to the special contract, the plaintiff may consider it void and recover on the common counts. 15 Johns. 475; 6 Johns. 110; 1 Com. on Con. 36; 1 Esp. 283; 2 Esp. 640.

So, also, where the contract is rescinded, or has been executed by the plaintiff, or put an end to by defendant, the plaintiff may disregard the contract, and resort to the common counts in assumpsit to recover what he has paid. 7 Cranch, 299; 4 Bos. & Pul. 351; 6 Term, 136; 5 Johns. 84; Bull. N. P. 139; 18 Johns. 455; 11 Wheat. 250; 10 Johns. 37; 2 Mass. 415; Com. on Con. 317; Newman v. McGregor, 5 Ohio, 349; and it is not necessary to give positive evidence of money had and received, but when from the facts proved it may be fairly presumed the action is maintained. Doug. 137. The action, says Lord Mansfield, Cowp. 807, 433] "is *governed by the most liberal equity. Neither party is allowed to trap the other in form."

Whether there was, in fact, a special contract between these parties at all, or one still open, or that had originated in fraud by defendant, or which he had put an end to or rescinded, or whether the plaintiff had fulfilled, and whether anything had been paid by the plaintiff upon it in money, labor, or board, were, in my opinion, questions of fact, and should have been left to the jury upon the proof, on broad and liberal principles of equity. 11 Wheat. 250. I am, therefore, on that ground, for opening up the nonsuit and allowing a new trial. I incline to go much farther than is necessary to decide this case, and to hold that wherever one man has availed himself of the labor, goods, or money of another, recovery may be had in this form of action, for just what in equity and good conscience the party is entitled to, *all things considered;* subject only to this limitation, that where there was a contract price no recovery shall be had for a greater sum than the one stipulated for. I can see no evil or inconvenience that would result from this. A recovery in this form would be as perfect a bar to the subsequent action, as if had in a suit upon the special contract, and each party may obtain a full statement of the real cause of action, by demand for a bill of particulars under our law. The proceeding is a simple one, and looks directly to the attainment of justice. Why, then, in such cases turn a plaintiff round into a court of chancery, or to a suit upon the special contract?

Lodwicks & Kennedy *v.* Ohio Insurance Company.

Insurer does not insure against loss resulting from the negligence of the assured, or those employed by him.

Master and mariners are agents for the assured.

Navigators of flat-boats on the Ohio river, that are insured, are agents of the assured, and are bound to all care and diligence. *Quære*, if bound in all cases to keep a watch at night?

New trial granted for further investigation.

This action is brought on a policy of insurance upon a quantity of corn, laden on board two flat-boats, bound from Louisville to New Orleans. The perils covered by the policy are, in the usual

434] terms of marine insurance, against "*rivers*, *fires, enemies, pirates, rovers, assailing thieves, *and all other perils, losses, and misfortunes*, which shall come to the damage of said produce, *according to the true intent and meaning of said policy*."

On the trial in Hamilton county, the facts proven by the plaintiffs were, in substance, as follows: The boats were both landed in the evening in an apparently safe place. The evening was calm, but the river was falling, and did fall about a foot during the night. In the evening all the crew and hands retired to rest, leaving no watch. About five o'clock in the morning the crew were awakened and found one of the boats sinking. It went down so rapidly that the hands escaped with difficulty, and without ascertaining the cause.

Upon this proof the defendants asked the court to instruct the jury that "if they were satisfied that the boat was landed and fastened to the shore at night; that the place of landing was apparently a safe one; that the night was calm; that the river was falling, and did, in fact, fall a foot or more, and that no watch was kept upon this boat, but that all the hands went to sleep, then the boat was not sunk within the perils of the policy, and the plaintiffs can not recover." The court refused to instruct the jury as required, but instructed them "that if they were satisfied that those in charge of the boats used due care to ascertain that the place of landing was a safe one, it was not indispensable to the plaintiffs' right to recover, that a waking watch should have been kept up." A verdict was taken for the plaintiff, and a new trial is asked upon the ground of error in the court in giving the case to the jury. The decision of the motion was adjourned to this court.

N. WRIGHT and HAMMOND, in support of the motion, cited Phil. on Ins. 124, 223, 225; 1 Condy's Marshall, 241; 1 Johns. Cas. 346; 13 Johns. 457; 5 Mass. 1; 8 Mass. 321; 7 Term, 505; 14 East, 392; 5 B. & P. 339; 8 Serg. & R. 533; 2 Wend. 327; 3 Pet. 222; Story on Bail. 323; 2 Kent's Com. 472.

BENHAM, for plaintiffs.

435] *WRIGHT, J., delivered the opinion of the court:

The real questions to be decided are, what is the meaning of

the general clause in this policy of insurance, and what constitutes such negligence in the navigators as will excuse the insurer?

The meaning of the general clause in marine policies, by which insurers undertake to indemnify for damage resulting from all other perils, losses, and misfortunes, or against *any peril whatever*, has been fixed by judicial construction. These terms are used in reference to established rules of law, and must be expounded by those rules. Grim *v.* Phenixon & Co., 13 Johns. 460. All the perils assumed in the policy are subject to one limitation: that although the loss be directly occasioned by the peril insured against, yet if that peril, in causing the loss, is occasioned by conduct of the assured or his agents, which are not insured against, the insurer is not liable. For instance, if the insurer take upon himself the risk of the sea, but not of the negligence or misconduct of the agents to whom the insurer intrusts the property, and it is sunk by the negligence or misconduct of such agent, the insurers are not answerable for the loss. It is esteemed certain that no underwriter has ever been held, under any contract of insurance, *in whatever form*, to be answerable for losses directly and evidently occasioned by the fault of the assured himself; and no doctrine is better settled than that the insurer is not liable, under the common clause of the policy, for losses resulting from the negligence of agents employed by the insured. Phil. Ins. 224; 14 East, 482; 8 Mass. 321; 2 New R. 336; 9 Johns. 21. In all such cases the insured is held in law impliedly to warrant that those persons he employs shall be careful and diligent, and that everything shall be done, to prevent loss, within the reach of ordinary human agency. This principle pervades the whole subject of marine insurance; and if loss happen through the want of care and diligence, it is held not to be within the intention of the parties to the contract that the insurer shall be accountable. 8 Mass. 322; Phil. Ins. 156; 2 Johns. Cas. 180; 1 Johns. 460; 5 Mass. 1; 7 Term, 505; 5 B. & P. 339.

*Are the master and mariners the agent of the assured or [436 the insurer? The owner is the agent for the shipper for transporting the goods, and employs, in the conduct of the business, other agents, the masters and mariners, for whose conduct in that employment he is accountable to the shipper. Marsh. Ins. 225. The captain and mariners navigating vessels in which insured property is laden are, in legal contemplation, the agents of the assured in

reference to the goods insured. They are liable to their immediate employers for their negligence or misconduct, and the owner is liable to the shipper for any loss resulting therefrom as common carriers. Phil. Ins. 225; Marsh. 241; 8 Mass. 321; 13 Johns. 459; 2 Wend. 327; Story on Bail. 323; 2 Kent Com. 472.

The captain and crew of the boats on which this insured corn was laden were bound to the use of ordinary diligence in its preservation. The establishment of that fact is essential to a recovery against the insurer. Does the case made exhibit the use of such diligence? The place where the boats were made fast being, *apparently*, a safe one, all hands went to rest, leaving no watch. Owing to some cause not known one of the boats sprung a leak in the night, and when the hands awakened in the morning, she was so far gone that they could not discover the cause, and went down so quick as to render their escape difficult. If this boat had been run foul of, or wrecked by the collision of any other body with her, the shock would probably have awakened the crew; if, owing to the fall of the water, she settled upon a snag and bilged, in all probability the cause would have been discovered. The cause of the disaster, whatever it was, operated silently and without violence upon the boat, and must have progressed gradually. The mere statement of such a cause indicated as the course of diligence and common prudence, that a watch should be kept up. The carrier promises to keep safely, and is bound that a safe and secure place is selected for landing; that the crew is competent; and that they will be diligent and careful in guarding and protecting the vessel and freight from accident. The common law rule determines all these things negligence which do not proceed from 437] the enemies of the state or the *act of God. These latter are technical terms, the meaning of which is settled by repeated judicial decisions. Acts denominated acts of God are natural and unavoidable ones. If proper care and diligence would have avoided the act, it is not excusable as the act of God. 8 Serg. & R. 533; 2 Wend. 327; Story on Bail. 323.

At the trial the court refused to instruct the jury that the omission to keep a waking watch on the boat was itself an act of negligence, but did instruct them that the keeping such a watch was not indispensable to the plaintiff's right to recover. Cases upon policies of insurance are new to the country; but few have ever been brought to trial in this state, and we are pleased to have an

opportunity to re-examine decisions made upon the circuit in the hurry of a trial before a jury. Upon re-examination and reflection in this case, we are satisfied that neither the charge the court was asked by the defendants to give to the jury, nor that actually given, in the terms asked or given, were in strict accordance with law. It should have been left to the jury to ascertain, as a fact, whether the loss resulted from the negligence of the hands, and the usage of the river as to the keeping watch might have been proven and submitted to them. Although we are not able to say precisely what influence the charge of the court may have exerted upon the finding of the jury, we feel disposed to grant a new trial, to afford opportunity for a more careful investigation.

New trial ordered, costs to abide the event.

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*John Morrison v. The State of Ohio. [438

In prosecution for concealing a horse-thief, it is not competent for the prosecutor to prove the confessions of the alleged thief, in the presence of the defendant, to establish the fact that a horse was stolen.

Writ of error to the court of common pleas of Jefferson county, returnable to this court. Morrison was indicted for that one Driskell, on January 1, 1829, stole a certain gelding, the property of a person to the jurors unknown, and that he (Morrison) on January 2, 1829, did conceal said Driskell in his (Morrison's) dwelling house, knowing him to be a horse-thief. Section 27 of the act for the punishment of crimes, 29 Ohio L. 141, provides that if any person shall conceal any horse-thief, knowing him to be such, he shall, upon conviction, be imprisoned in the penitentiary not more than fifteen nor less than three years. The bill of exceptions with the record in this case shows that during the trial, upon the issue of not guilty, the state, in order to prove that Driskell had stolen the horse mentioned in the indictment, called a witness to detail his confessions made in the presence and hearing of Morrison. This was objected to for the prisoner, but admitted. It shows also that the prisoner, by his counsel, insisted to the court that in the trial of this indictment, before Morrison could be convicted

legally, the prosecution was bound to prove that Driskell had been convicted of the crime of stealing the horse mentioned in the indictment, which objection was overruled by the court. The prisoner was found guilty, sentenced to eight years' imprisonment, and is now in the penitentiary.

To this record four objections are taken—two to the indictment and two upon the proceedings at the trial, viz:

1. That it is not charged that Morrison knew Driskell had stolen *the horse* described in the indictment.

2. That there is no averment that pursuit was made after Driskell, or any attempt made to arrest him for his offense at the time Morrison concealed him, nor any fact to show that he was concealed to assist his escape from justice, or to aid him in committing the offense.

3. That the confessions of Driskell were improperly admitted to prove that he stole the horse.

439] *4. That the court erred in ruling it unnecessary to the conviction of Morrison, to prove that Driskell had been convicted of stealing *the horse* described in the indictment.

MARSH, for the plaintiff in error, cited 3 P. Wms. 493, 502; 1 Chit. C. L. 138, 217–219; 2 Chit. C. L. 6; 2 Hawk. C. L. 29, secs. 26, 32, 43–46; Com. Dig., tit. Justices; 2 Inst. 183; Arch. C. Pl. 154, 402, 403,; 1 Hale P. C. 619; 1 Leach, 232, 418; 3 Camp. 264; 2 Russ. on C. 253, 259, 589, 652, 708; 1 Phil. Ev. 33, 76, 87; Kel. 18; Gilb. Ev. 124; 2 Stark. Ev. 53, 401, 411; 4 Car. & Payne, 215, 221, 250; 2 Price, 299; 3 Mass. 126.

J. COLLIER, for the state, cited 2 Russ. on C. 589, 708; 1 East, P. C. 37, ch. 2; 1 Stark. Ev. 401, 411; 6 Term, 528; 1 Blackf. 429.

Judge WRIGHT delivered the opinion of tht court:

The charge in the indictment is, that Driskell had stolen a horse, the property of some unknown person, and that Morrison, the plaintiff in error, afterward concealed him, knowing him to be a horse-thief. On the trial, it is claimed that the court of common pleas illegally admitted proof of Driskell's declarations to Morrison to establish the allegation that Driskell had stolen the horse

described. The question is, were the confessions or declarations of Driskell competent evidence against Morrison to prove the fact.

Any voluntary confessions of one accused of crime is evidence against him at common law. 2 Stark. Ev. 51. But such confessions are only evidence "against the person himself who confesses, not against other persons, although they may have been proven to be his accomplices." 1 Phil. Ev. 77; Kazer's case, 5 Ohio, 280. The allegation in this indictment that Driskell had stolen the horse was material, and to be proven by the prosecution. That fact, and the prisoner's knowledge of it, imparted to the alleged concealment of him its criminal character. The efforts of the counsel for the state, in the argument to assimilate Driskell *and [440 Morrison to conspirators, in order to open the door for proof of the acts of each against both, and of the declaration of one made at the time against his fellow, are not in our opinion well grounded. Though the authorities cited sustain the positions assumed, yet they do not relieve the case from the objections taken. The case made does not rest on the position that Driskell and Morrison *combined together* for an illegal purpose, nor is the confession of Driskell of an act done in pursuance of a preconcerted plan, and in reference to a *common object*. The concealing a horse-thief, knowing him to be such, is a distinct, independent offense, both upon principle and under the provisions of our statute. 29 Ohio L. 141; 1 Blackf. 429. The thief must be named in the indictment against the receiver, if known; and, before conviction, he is a competent witness against the person concealing him. 1 Leach, 418; Arch. C. Pl. 154. If the record showed that proof had been introduced to satisfy the jury that Driskell had stolen the horse mentioned in the indictment, and upon that the prosecution had sought to establish Morrison's knowledge of the guilt when he concealed him, proof of what Driskell told Morrison would have been both competent and sufficient, unless the communication was attended by circumstances to induce a disbelief of the tale. This case is different. The proof here was not directed to make out a *scienter* in Morrison, but the fact of Driskell's having stolen the horse. In this view it appears to us the court admitted the declaration of one not a party to the record, nor a confederate, to sustain the material allegation, that said third person was a horse-thief in general terms; and that, too, without any proof that a horse had in fact been stolen by or from any person known or un-

known. Such declarations, for such a purpose, we think clearly incompetent. See Daniel v. Patten, Moody & R. 501.

This opinion requires of us to reverse the judgment, to set aside the proceedings subsequent to the issue, and to award a new trial. The other questions discussed it is unnecessary to examine at this time, and we leave them wholly untouched.

441] *This decision will be certified to the clerk of the Supreme Court in Jefferson county to be there recorded, and the keeper of the penitentiary will be directed to remove the prisoner to that county for trial.

AARON WRIGHT, JR., v. HARVEY MUNGER, PAYMASTER.

In suits before justices to recover militia fines, appeal lies to the court of common pleas.

THIS is a *certiorari* to the common pleas of Warren county, and was reserved in that county for decision in bank. The transcript returned shows that an action of debt was commenced by Munger, paymaster of a militia regiment, against Wright, before a justice, on which judgment was rendered against Wright for debt and costs. Wright appealed this judgment to the common pleas and entered bail regularly, and docketed the appeal. The transcript filed, described the action before the justice in general terms as debt, but did not show *how* the cause of action arose, except what could be deduced from the description of the plaintiff as paymaster, etc. Munger moved the common pleas to quash the appeal, because the suit was for a fine assessed by a court of inquiry under the militia laws of the state, from which no appeal is provided. In support of this motion, an affidavit was received by the court to show that the action before the justice was to collect a militia fine which was excepted to. The appeal was quashed, and to reverse the order for quashing this *certiorari* is brought.

A. HARLAN, for plaintiff in error.

J. M. WILLIAMS, contra, cited sections 1 and 2, of article 3, of

the Ohio constitution; 22 Ohio L. 50; 29 Ohio L. 57, 177, 205, 208 392, 490, 509, and the militia law of Ohio of 1831.

WRIGHT, J., delivered the opinion of the court:

*The plaintiff in error insists that the common pleas [442 erred: 1. In receiving evidence out of the justice's transcript to show what the cause of action was. 2. In quashing the appeal. We limit our inquiries to the last error assigned. The act of assembly of March 14, 1831, 29 Ohio L. 171, 189, defining the powers and duties of justices, etc., gives them cognizance of actions for "any sum not exceeding one hundred dollars," except actions of trespass involving the title to real estate, actions of assault and battery, malicious prosecution, ejectment, replevin, slander, libel, upon real contracts, and against officers for misconduct in office. The act allows an appeal from the final judgment of the justice, except judgments rendered by confession. 29 Ohio L. 178.

The militia law of 1831 provides, page 36, for the organization of a regimental court of inquiry in each regiment, to be composed of the major and commandants of companies, for the assessment of fines. Section 37 gives to the person aggrieved by the decisions of the court of inquiry a right of appeal to the court of appeals, a military tribunal composed of the field officers of the regiment and the senior captains, or any two of them. When the fine remained unpaid after notice by the paymaster, section 39 requires of the paymaster to lodge the list of fines with a justice, who is to proceed against the delinquent, making the paymaster plaintiff, "as in other cases of debt," to judgment and execution for the unpaid fine and costs, unless the delinquent can satisfy said justice that he was not liable to be fined, or that the fine against him ought to have been remitted by the court of appeals.

The counsel for the defendant in error has discussed the several questions raised in this cause with great ingenuity and ability, and insists that the appellative jurisdiction of the court of common pleas from justices' judgment extends only to *civil* cases; and he denies their jurisdiction in this case, because it is not civil; neither arising *ex contractu* nor *ex delicto*, but being, in his own language, "peculiarly like nothing else but itself, *a militia case.*" The general clause, allowing appeals from justices, has been uniformly construed to embrace all cases in form civil, where no express prohibition is interposed to the contrary by the legislature.

443] It has been held to *include *penal actions*, and in Bittle *v.* Hay, 5 Ohio, 269, was held by this court to embrace a case brought for a penalty in obstructing a highway. Counsel insist that this construction is unsound, and cites a variety of statutes providing for summary proceedings before justices, where appeals are allowed in express terms, and thence, and from the silence of the legislature in the militia law, deduces that no appeal was intended in this class of cases. We do not perceive how the allowance of appeals, by express provision in special cases, can be understood as expressing the intention of the legislature to restrict the usual and fair operation of the general clause allowing appeals.

The action is debt. It is brought upon the judgment of a military court of competent jurisdiction, to determine the subject. Debt upon judgments of foreign courts upon penal statutes of foreign countries, have been sustained in our courts, upon the principle that after judgment the transaction no longer retained its penal character. Indiana *v.* John, 5 Ohio, 219; 1 Ohio, 259. It does not change the situation of the case, that the legislature has allowed the jurisdiction to look behind the proceedings of the court of inquiry. The law holds the decision of the court of inquiry only *prima facie* evidence. It is not our province to inquire why the legislature took from these military tribunals the right of executing their own sentences by the ordinary means of military courts, or omitted to authorize them to issue execution, and to levy and sell as upon executions from the common law courts. Nor is it material to inquire why it was thought necessary to have a suit and judgment for fines before a justice of the peace, after the decision of a proper military court, or why, after that again, an appeal should be allowed, and another trial had before the common pleas. If such are the provisions of the law, and we think so, it is our business to apply them to cases as they arise. We think an appeal in this case within the provisions of the law, and that the court of common pleas erred in quashing it. For that cause the order of the common pleas quashing the appeal must be reversed, and the cause remanded, with instructions to reinstate the appeal, and proceed.

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*Edward Williams' Administrators v. Isaac Williams' Administrators. [444

Action of *assumpsit* within the statute of limitations of 1810.

Statute of limitations liberally construed.

Where security pays a whole debt voluntarily, action accrues against principal, from the time of payment, without notice or demand.

Payment by surety or co-obligor in small sums, at different times, does not give a right of action for each separate payment without notice or demand.

This is an action of assumpsit for money paid. Issue is taken upon the pleas of *non assumpsit* and *non assumpsit* within six years. The case was submitted to the court in Pickaway county, on an agreed statement of facts, and adjourned for decision here. The material facts agreed are, that Edward and Isaac Williams entered into a joint and several bond to one Heath, for twenty-two hundred and nine dollars, which fell due on September 14, 1817. Each was to pay a moiety of the debt. After the bond fell due, though more than six years before the suit commenced, Edward paid the obligee a small sum, more than one-half of the principal and interest then due on the bond. Several years subsequent to this payment, suit was brought on the bond against both obligors, and judgment recovered against both. Shortly after this judgment, Isaac died, and Edward paid the whole amount. To recover back the money so paid with interest, this suit is brought. If the court, on these facts, is of opinion that any part of the plaintiff's claim is barred by the statute of limitations, it is agreed he shall have judgment for fifteen hundred and seventy-five dollars and eighty-eight cents; but if no part is so barred, then he shall have judgment for sixteen hundred and seventy-three dollars and eighty-seven cents and costs.

G. Swan, for plaintiff, cited 8 Ohio L. 62; Terms de lay, 12; 1 Chit. Pl. 86, 87, 286; 2 Chit. Pl. 664; 5 Ves. 792; Jeremy's Eq. 516; 2 Term, 370; 2 Sch. & Lef. 634; 2 Coxe, 173; 1 Atk. 89; 2 Com. Dig. 414, Contribution, S. 2; 1 Taunt. 572; 2 Taunt. 323; 20 Johns. 586; 3 Esp. 159, 160.

No argument was presented for the defendant.

WRIGHT, J., delivered the opinion of the court:

Four questions are raised by counsel for our decision in this case·

1. Whether the action of assumpsit was limited at all by the act of 1810, which was in force when these payments were made.

445] 2. *Whether this class of cases does not so far relate to the execution of a trust as to be without the statute of limitations.

3. From what time the statute begins to run; whether from each payment of a part; from the payment of the entire sum only, or from the period when the original obligation would be barred.

4. Whether the action accrues to one paying money without coercion for a co-obligation, until notice be given, or demand is made.

1. The act for the limitation of actions of 1810, 8 Ohio L. 352, limits "all actions upon the case" to six years. Although the act does not limit the action of *assumpsit* by name, yet it has been uniformly held that action was embraced in the general terms "actions upon the case." This construction has obtained in our courts of justice, and is not now to be disturbed.

2. Trusts are sometimes excepted from statutes of limitations by express provision of law, but more frequently by judicial construction. It is well known that courts have formerly made great progress by multiplying exceptions from the enactments, toward a total repeal of statutes of limitation; but latterly the course of decisions are more in conformity with the obvious meaning of such laws. We think such statutes should be enforced, like every other legislative act, according to the intention of the law-maker as expressed in the act itself. But inquiry upon that point is unnecessary, in this case, as we are of opinion the agreed facts do not establish a trust within any known exception to statutes of limitation.

3. Where one under legal obligation for another pays money for him, the law supplies the request, and because it is the duty of the person thus benefited to refund, implies a promise to do it, and this implied promise is enforced by the action of assumpsit. It is not necessary that he who is thus bound for another shall wait until he is sued and coerced to pay by judgment and execution. If the money for which he is bound is due, he may pay without suit and have his action. In Cole *v.* Saxby, 3 Esp. 160, Lord Kenyon is reported to have said "there had been a case in which a very con-

siderable *law authority had been of opinion that such a debt [446
was entitled to the same limitation as the deed itself," the original obligation. We have not been able to find the "law authority" referred to in that report, but the question and this doctrine of Lord Kenyon have been fully considered by the Supreme Court of Massachusetts, in the case of Penniman v. Vinton et al., 4 Mass. 276, and the position held not to be well founded. Chief Justice Parsons, in giving the opinion of the court, says: "The action is not founded on a bond, but on the promise or simple contract (although the execution of the bond, as to a surety, is the consideration of the promise), and the breach of the promise is the not indemnifying against the payment of the bond, and is not the non-performance of any contract to which the principal was forced by deed to the surety." The case in Massachusetts differs from the one at bar, in this, the payment here was by a co-obligor, in that it was by a surety for his principal. In principle, so far as regards the question before the court, no material difference is perceived between the cases. The authority is conclusive against the assumption that in cases where one pays money for another on a bond, the action for the money so paid is limited only by the time the right of action on the bond would be limited. The statute in all such cases begins to run from the time the cause of action accrued, without reference to the limitation provided by law on the original obligation.

4. But we are unwilling to admit the proposition that a co-obligor may pay in small installments, and without demand or notice have a suit for each sum so paid. In this class of cases we hold notice to the person for whom the money is paid, either actual or constructive, essential to perfect a right of action in the party paying, and it follows that until such notice the statute does not begin to run upon such claims. 20 Johns. 586; 1 Taunt. 572; 2 Taunt. 323. There is not anything in the facts agreed in this case, which shows that Isaac Williams ever had notice of the first payment by Edward. Nor is there anything from which such notice may be fairly inferred, until the rendition of the judgment against both for the balance, deducting the sum so paid. *If the statute is held [447
to begin to run at that time, six years had not elapsed when this suit was brought, and upon the agreed case, we hold that the statute then began to run. As to the other payments, there is no pretense of their being barred.

Upon the agreed case, therefore, the plaintiff is entitled to judgment for the one thousand six hundred and seventy-three dollars and eighty-seven cents and costs. But inasmuch as the cause of action for the first payment was not complete until notice, no interest should have been computed beyond that time. The plaintiff deducted the interest, and judgment was rendered for the balance.

Newcomb's Lessee v. Christopher Smith.

Order for sale of decedent's real estate, made in 1813, can only be proved by the record. If such order be not entered on the minute-book of the court, as required by law, it can not be valid, and parol proof, or other memorandum in writing, to show that it was in fact made, can not be received.

In 1813, order for sale of real estate, by administrator, is to be made after return of the appraisement.

Sale of decedent's real estate, made by administrator, upon joint application with guardians, not to pay debts, but to maintain children and improve the property, is invalid.

This was a motion for a new trial, in an action of ejectment, reserved from the county of Hamilton.

On the trial the plaintiff exhibited a connected legal title to lot No. 40 in Cincinnati. The defendant's title depends on the validity of a sale of the lot by the administrators of Jesse Newcomb. The sale was proved by the administrators' deed. To prove the right to sell, the following documents were offered in evidence:

1. A paper from the files of the common pleas of Hamilton county, indorsed, "A petition for the sale of real estate of Jesse Newcomb, deceased, April, 1813," a copy of which is as follows:

"*To the honorable judges of the court of common pleas, Hamilton county:*

"We, your petitioners, who being appointed administrators of the estate of Jesse Newcomb, and guardians of the children of said Newcomb, deceased, humbly showeth that we are anxious for the welfare of his widow and children, take this means to acquaint the honorable court with the situation of the property, consisting

of a lot of ground in Cincinnati, situate on Sycamore street, being part of lot No. 40 in said town plat, being thirty-three feet in front and one hundred and ninety-eight feet *deep, with the [448 walls of a brick house twenty-four by eighteen feet, and shingled in, and a small frame building back, together with a work-house thereon; that the property is now in the situation it was at the death of said Newcomb, and there is no funds belonging to said estate to finish it, nor for the support of the widow and children. We therefore pray the honorable court to grant us a permit to sell the real property.

"WILLIAM LYNES, *Administrator.*
ANN NEWCOMB, *Administratrix.*
E. HALL,
CHRISTOPHER SMITH, } *Guardians.*

"CINCINNATI, *April* 14, 1813."

On the back of this is written, in the handwriting of one of the associate judges of that court: "Allowed. John Wood, John Crone, James Hicks, appraisers."

2. The following document, under the seal of the court: "Whereas, by a petition to the honorable the court of common pleas of Hamilton county, at April term, instant, close in these words" (recites the foregoing petition). "Which petition being read, and all and singular the premises aforesaid being seen and fully understood, upon mature deliberation the court do order that the above-described property be sold and conveyed by said petitioners, and they appoint John Wood, John Crone, and James Hicks to appraise said property agreeably to the statute in such case made and provided, and that you in all things observe and be governed thereby.

"By order of court.

"[L. S.] In testimony whereof I have hereunto set my hand, and affixed the seal of our said court of common pleas, at Cincinnati, this 15th day of April, 1813.

"JOHN S. GANO, *Clerk.*"

This paper is indorsed thus: "Order of court for the sale of real estate of Jesse Newcomb."

3. The original appraisement is as follows: "We, the appraisers chosen by the court of common pleas in the county of Hamilton to value the real property of Jesse *Newcomb, deceased, after [449

viewing the premises, do value the same at one thousand one hundred dollars.

"JOHN CRONE,
JAMES HICKS,
JOHN WOODS,
"*Appraisers.*

"CINCINNATI, *April* 16, 1813."

4. The settled account of the administrators of J. Newcomb.

W. Lynes, sen., and Ann Newcomb, administrators of J. Newcomb, deceased, in account with the estate of J. Newcomb, deceased.

Dr. to divers items...		$464 22
Cr. by divers items...		464 22
Amount of sale of house and lot...	$1,590 00	
Interest on $1,060, 1 year...	60 36	$1,650 36
Paid widow one-third amount of sale...	530 00	
Paid interest on $1,060...	60 36	
Paid Dr. Douglas his bill...	10 00	
Paid widow for support of three children...	60 00	
Paid for bank stock...	990 00	$1,650 36

This account is indorsed, "Jesse Newcomb, dec'd, filed August 16, 1814. J. S. Gano, Clerk."

Mr. Gano, the clerk, testified that the journals of that and several other terms were originally kept in separate stitched paper books, which he had collected and bound. Some leaves appeared not to be present, and some entries were written on loose papers, attached to the book by wafers.. He knows no alteration or mutilation, but, as far as he knows, they remain as they were made by the court. That the petition was filed by him, and the order of sale made by the court, but no entry of it is found on the journals.

The plaintiff objected to the whole of this evidence, but it was received by the court, who directed the jury to return a verdict for the defendant. The plaintiff moves the court for a new trial, assigning for cause, that the evidence was improperly rejected, which motion is reserved for decision in bank.

450] *LONGWORTH and WORTHINGTON, for plaintiffs.

STORER and FOX, for defendants, insisted:

1. That the proof shows an order made.

2. That however improvidently or erroneously granted, it can not now be questioned, or its propriety investigated. 4 Dal. 451; 2 S. & R. 4; 11 S. & R. 431; 4 Wash. C. C. 657; 13 Mass. 166; 6 Johns. Ch. 387; 7 Wheat. 59; 2 Pet. 163; 3 Ohio, 257, 560; 4 Ohio, 130.

Judge LANE delivered the opinion of the court:

If the testimony does not prove that an order for the sale of the property was made by the court, it ought to have been rejected, and the plaintiff is entitled to a new trial; for the power of the administrator to sell arises from the action of the court, and without it the sale is void. By section 102 of the judiciary act then in force, 8 Stat. 294, proceedings, orders, judgments, and decrees are of no force or validity until entered on the journals and signed by the presiding judge; consequently the order of sale can only exist as a matter of record, and is only provable by its production. Heirs of Ludlow v. Johnston, 3 Ohio, 577; Goforth's Lessee v. Longworth, 4 Ohio, 129.

The parol testimony must be rejected, for the fact can not be proven by parol. An inspection of the journals afford no ground to raise the presumption that they ever contained such an order. No probable evidence is presented that any part of the journals of that term is lost. The paper described as No. 2 shows no reason for believing such an order was entered on the journals. It is the certificate by the clerk of an act of the court, which can only be shown by the production of the record, or by making proof of its loss.

No act of the court, or of any member of the court, appears in any of this testimony, except the indorsement of the appraisers' names and the word "allowed" written on the original petition by one of the associate judges. By the statute then in force, 8 Stat. 159, 332, on an application *by an administrator to sell [451 lands, the court, on being satisfied of the necessity for a sale, were directed to appoint appraisers, but no order for sale was to be made until the return of the valuation. 4 Ohio, 130. If the word "allowed" should be held to imply that the court granted the prayer of the petition, the interpretation which we should attach to it, standing in its connection on this paper is, that the court were convinced of the necessity of the sale, and assented to the appointment of appraisers; not that they designed to make a pre-

mature order of sale, for an ambiguous phrase should be construed into that which the court could rightfully perform, rather than into an irregular exercise of power.

We therefore are led to the conclusion, that the testimony offered contains no legal evidence that an order of sale was made, and it should therefore have been rejected.

Perhaps another reason exists for the exclusion of the testimony. I do not refer to the fact that Smith, one of the guardians, and one of the petitioners, was the purchaser, since perhaps this objection might not prevail, except in a court in equity. But the court of common pleas had power by section 32 of the statute to authorize administrators to sell to pay debts. By section 34 the court might authorize guardians to sell the lands of their wards "for good cause shown." This application to sell was by both administrators and guardians, not to pay debts of the estate, but for the support of the widow and children, and for the benefit of their property. With these objects the administrators had no concern, the guardians alone could act; yet, if a due order of sale was made in this case, it was executed, not by the guardians, but by the administrators, who were not capable of receiving any such authority. 1 Pet. 340; 2 Pet. 157.

New trial granted. Costs to abide the event of the suit.

452] *SAMUEL MCCHESNEY'S LESSEE *v.* WILLIAM WAINWRIGHT.

Deed describing the land conveyed, as half the tract granted to M., January 9, 1804, *prima facie* a good description.

Grantee bound by recitals in the title of his grantor.

It is no defense in ejectment, that after the suit is commenced, the plaintiff takes possession of the premises in dispute.

MOTION for a new trial reserved from the county of Clermont.

At the trial in the Supreme Court, the plaintiff proved that his lessors were the widow and heirs of Samuel McChesney. He produced a deed from John McDowell and wife to Samuel McChesney, dated October 16, 1818, a patent to McDowell, dated January 9, 1804, and a plat and survey from the county surveyor.

The defendant gave in evidence a deed from McChesney to Joseph Kemp, and a deed from Kemp to him.

To rebut this title, the plaintiff produced a mortgage deed from Kemp to McChesney, given him before his conveyance to Wainwright, with proof that when Kemp purchased of McChesney, he gave back a mortgage deed as security for the purchase money, which is still unpaid. The mortgage conveys the land by the following description: "All the east half of a tract of land, granted to John McDowell on January 9, 1804; beginning at a black oak and gum, standing in the northeast corner of said original survey, and runs from thence west one hundred and forty-two poles to three white oak trees, standing in the middle of the north bounds of said tract; thence south four hundred and sixteen poles to a hickory stump, standing in the south bounds of said tract; thence east one hundred and forty-two poles to a sugar tree, in the southeast corner of said tract; thence north to the place of beginning."

The introduction of this deed was resisted by the defendant's counsel, because they alleged it contained no sufficient description to transfer any lands, but the objection was overruled.

The defendant then offered to prove as a defense, that the lessors of the plaintiff had taken possession of the land, which proof was rejected, and a verdict rendered for the plaintiff. This motion for a new trial is made for the two causes, the admission of the mortgage deed, and the rejection of the testimony offered by defendant. The decision of this motion is reserved for the court in bank.

*STRAIT and HAWES, for plaintiff. [453

No counsel appeared for defendant.

LANE, J., delivered the opinion of the court:

The mortgage from Kemp to McChesney professes to convey the east half of a tract granted to McDowell on January 9, 1804, and proceeds to recite the specific abuttals. We are without the benefit of a brief from the defendant, and are left to gather the objection from the written motion. If we do not mistake the point intended to be raised, it is that this deed conveys no land, from the generality of its description, especially in its omission to

designate the county, township, or water-course on which it is situate.

We know no rule of law, which requires the insertion of these points in the description, provided it is sufficiently identified. If the description in a deed be so imperfect that it can not be known what land was intended to be conveyed, the deed is void. 4 Mass. 205. But although it is necessary to the validity of a grant, that the thing granted should be capable of being distinguished from other things of the same kind, it is not necessary that the description should be such as to identify the object without the aid of extraneous testimony. 5 Wheat. 359. And if a deed refer to another deed for the description of the land conveyed, and the land can be ascertained by such reference, the description is sufficiently certain. 6 Pick. 450.

The land which the parties attempted to transfer by this mortgage, consisted of one-half the tract granted to McDowell on January 9, 1804. This reference adopts the description in McDowell's grant; and if by combining them the jury can ascertain the land, the deed is effectual to transfer it. If it be said that the grant to McDowell is not sufficiently identified, that he might have had two grants of the same date, it is a sufficient answer that the two grants are not to be presumed, and that it will be early enough for the plaintiff to explain, when the testimony of the defendant shall render the intentions of the parties ambiguous.

Besides, Wainwright holds Kemp's title, and is bound by all 454] that binds it. Kemp purchased of McChesney, by a *deed bearing the same date with his mortgage; so that he and all who hold his title are bound by its recitals and admissions. 5 Ohio, 194. This deed from McChesney, which identifies the land with the land mortgaged, by employing the same description, recites that it was purchased of McDowell, and *lies in the county of Clermont.* The defendant, by his acceptance of Kemp's title, adopts this admission, and supplies that part of the description, which we understood him to allege is wanting in the mortgage. We are of opinion that the deed was properly submitted to the jury.

The second objection taken, arises from the rejection of proof, that the guardians of the plaintiff's lessees had taken possession of the land during the suit. Proof of this suit was properly excluded, unless it proves a defense.

The rights of the parties to a suit are genera'ly to be acted

upon, as they existed at its commencement. In ejectment these rights are founded on a trespass and eviction. To redress these the plaintiff is entitled to recover a judgment for the land, for damages and for costs; and this judgment enables him to obtain the mesne profits in another suit. If circumstances occur by which one object can not or ought not to be obtained, the plaintiff is still entitled to pursue the other. An alienation during the suit furnishes the defendant with no defense. 2 Ohio, 293, 304. And where the estate of the plaintiff's lessee is for life only, and it expires during the suit, so that there remains no right to possess the land, yet the plaintiff shall have judgment. 2 Str. 1056; 8 Johns. 507; 18 Johns. 302. The acquisition of the possession by the plaintiff only accomplishes one object of the suit; he is entitled to judgment to recover his costs, and to aid in further remedies.

The facts offered to be proved constituted no defense; but if they had been, they were not admissible under the general issue. There is no difference between actions of ejectment and other suits, in which matters of defense arising after issue joined must be brought forward by plea *after the last continuance.* 7 Johns. 194.

Judgment is entered on the verdict.

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*John Starke's Lessee v. Smith. [455

Lands granted to A. and taken possession of by B., whose possession is not protected by the statute of limitations; proof that. B. purchased the warrants of A. before their location, located them and paid the taxes, not admissible to raise the presumption of a conveyance from A. to B.

The facts in this case may be found in the opinion of the court.

Culbertson, for defendant.

Starke, for plaintiff.

Judge Lane delivered the opinion of the court:

This is a motion for a new trial of an action of ejectment, tried in the county of Tuscarawas.

At the trial, the plaintiff produced a patent for the land to John Starke, dated August 6, 1803, and proof of his death; that the lessors of the plaintiff are his heirs and that they have never resided in this state.

The defendant offered to prove by parol, that in 1800 he purchased of John Starke his warrants, paid a full consideration for them, received and registered them, located and took possession of the lands in 1801, and has since remained in possession. Upon these facts he insisted: 1. That his possession was protected by the statute of limitation. 2. That the patent of 1801 vested the title of the land in Starke, in trust for him, and that from the length of time; the plaintiffs delay; the possession, and the payment of taxes by the defendant, that the jury should presume a conveyance to have been made to him.

The testimony was overruled, and a verdict rendered for the plaintiff. To correct the alleged mistake of the court, in the rejection of this testimony, the motion for a new trial is made by the defendant.

There is no ground for the position, that the right of action is barred by the statute of limitation. None of the lessors of the plaintiff were ever in this state until shortly before the institution of this suit; and consequently they are within the saving of section 7. 29 Stat. 216.

The substantial question arising in this case is, whether the facts 456] do not raise the presumption that the land was conveyed *to the defendant. If the jury were authorized to deduce this inference, the charge was incorrect, and the defendant is entitled to a new trial.

This point has recently been the subject of examination by the Supreme Court of Connecticut, 2 Conn. 617, and the opinion of a very eminent judge, who reviews all the authorities, leaves little to be done by us, except to repeat his reasoning and adopt its results.

The statute of limitations is designed to make all the provision which the law deems necessary to quiet the possession of corporal subjects; but no length of enjoyment of incorporal hereditaments (which do not lie in seizin or possession) is protected by the direct operation of the statute. Yet from the manifest policy of quieting long enjoyment, courts have extended the operation of the statute beyond

its letter, by establishing upon its analogy a presumption of right from length of *user*. From this principle is derived the undoubted rule, in respect to easements and incorporal rights, that a grant, or anything else necessary to legalize a right, may be presumed from long enjoyment. And in these cases, the mere fact of possession for a length of time in analogy with the statute of limitations, is the *only* fact to be proven; from which *alone*, a title is peremptorily to be presumed, on the principle of quieting enjoyment, without regarding whether an original title is believed to have existed or not.

But in respect to corporal rights, this rule of presumption has not been applied. They are within the purview of the act of limitations; to superadd the doctrine of presumption, is to multiply those provisions, or rather to make a new statute. If by a rule of presumption, professedly adopted in analogy with the statute, a possession is to be quieted in other cases within its purview, and not within its sayings, it is plain that persons and rights not intended by the legislature to be affected, will be subjected to its operation. In all cases in which the statute operates, the only bar arising from length of possession, is that prescribed by its provisions.

It is true that in some cases length of possesion may be proved with other circumstances, to perfect the evidence of title to lands; but the distinction between this principle and *the doctrine [457 of conclusive presumption, as applicable to corporal rights, is very plain. In the one, length of possession is *itself* a bar, and raises the conclusive legal presumption of a grant, even under circumstances in which no grant would actually be made. But where an *actual transfer of title is to be shown by secondary evidence,* when the deed or original evidence is tested by length of possession, is, like every other circumstantial fact, corroborative evidence, and in this light alone is admissible to prove an actual transfer. In these cases, it is immaterial whether the subject be corporal or incorporal, the length of possession is no more essential to the main fact than any other circumstance.

The distinction here pointed out may be found running with the whole current of decisions. The editor of Phillips' Evidence (Phil. Ev. 124) is mistaken in asserting that the doctrine of presumption is applicable to cases within the act; the case cited, 11

East, 467, is one of crown lands, not affected by the operation of the statute.

The testimony offered authorizes no inference of the facts necessary to be shown to maintain the present defense. That he purchased and had custody of the warrants in 1800, before Starke's legal title accrued, and that he has held possession of the land since 1801, treating it as his own, makes no more than the common case of a possession under an equitable title, and affords no ground to raise the presumption of fact, that an actual deed was made.

But it is insisted that the possession of a *cestui que trust* shall not be disturbed by his trustee. In cases of direct trust, where the possession is provided for by the deed, perhaps the position may be correct; but it has no place in trusts raised by construction merely. Ohio, 264.

The motion for new trial is overruled.

458] *LAFFERTY'S LESSEE *v.* DANIEL BYERS.

Land advertised to be sold for taxes as original quantity, one hundred and seventy acres to be sold, seventy-three insufficient description.

THIS was a motion for a new trial, reserved in the county of Champaign.

The action was ejectment, in which the plaintiff's title depended on a sale of land for taxes. He offered in evidence an exemplied copy of the books of the county auditor, showing the listing for taxation and the advertisement of the sale, in the following manner:

Name.	No. of Entry.	Original Proprietor.	Original Quantity.	Water-course.	Acres.	Rate.	Tax.
Haines, John.	4,401	John Haines.	170	Mad River.	73	2	392.2

The court instructed the jury that this description was so im-

perfect, that no valid sale for taxes could be made. A verdict having been rendered for the defendant, this motion for a new trial is made by the plaintiff, because he considers this instruction erroneous.

Judge LANE delivered the opinion of the court:

To sustain a title acquired by the purchase of land for taxes, every substantial requisition of the law must be complied with. The authority to sell is construed strictly; no presumption is made in its favor; and proof of the regularity of the proceedings must be made by him who rests his title upon them, except in so far as this rule may be modified by our statute, in making the deed *prima facie* evidence of the facts. 2 Ohio, 504; 4 Cranch, 504; 4 Wheat. 77; 6 Wheat. 119; 4 Pet. 350.

The law, in requiring an advertisement of the sale, has the double object in view, to apprise the owner that the tax is unpaid, and to invite the attention of purchasers in such manner that the land may be sold for its fair market price. To attain these objects, it is necessary that the description should be such that the owner may know that the tax on his land is unpaid, and that purchasers may *know or learn the precise tract intended, and be ena- [459 bled to estimate its actual value.

In this case, the whole original entry was tested by its then owner, Haines, and perhaps was sufficiently described by its number and water-course; but ninety-seven acres had been transferred to another name, leaving seventy-three acres still standing to Haines. What seventy-three acres? In common or separate? If separate, in what part of the lot does it lie? The answers to these questions materially affect the price. Without them, no such information is communicated to the public as is calculated to produce a fair competition, and no prudent man will offer its value in his bid. The description, therefore, is not adapted to promote a fair sale, and it must be holden insufficient.

This point has been before decided. A levy by the sheriff upon "one hundred acres, section 4, township 7, range 4," has been holden too vague. Lessee of Mathers v. Thompson, 3 Ohio, 569. The assessment of a tax upon "part of a lot," or "one acre of a lot," is not valid. Lessee of Massie's Heirs v. Long, 2 Ohio, 287. A sale for taxes, under an advertisement of "one-half lot 4, in square 461," without designating which moiety, and that it was held

in common, is void. Ronkenderff v. Taylor's Lessee, 4 Pet. 350. We cheerfully follow these authorities, and hold the instruction right.

Motion for new trial overruled.

WILLIAM FERGUSON ET AL. v. DAVID MILLER, THOMAS MAXWELL, WILLIAM GRIMES, AND BENJAMIN ANDERSON, EXECUTORS OF W. ANDERSON, AND SARAH ARCHBOLD AND JOSEPH W. SPENCER, ADMINISTRATORS OF JOHN ARCHBOLD.

THIS is a suit in chancery reserved from the county of Harrison.

460] *The bill states that the plaintiffs are the children and heirs of Joseph Smith and Elizabeth Smith, his wife, who was one of the heirs of David Miller, deceased. That David Miller died in 1816, leaving David Miller, the defendant, his administrator. Maxwell, Anderson, and Archbold were the sureties of the administrator. That a bill was formerly filed against these defendants by these plaintiffs, seeking an account, settlement, and distribution of the estate of David Miller, which was dismissed as to the sureties, merely on the ground that no suit could be sustained against them until the liability of the administrator was established; but a decree was passed against Miller, the administrator, finding a balance in his hands and ordering payment. The present bill avers the non-payment of the money, the insolvency of Miller and Maxwell, the surviving parties to the bond, and seeks to enforce the payment of the money found in the hands of the administrator by that decree, from all the parties to this suit.

The defendants demur, assigning for cause that a former suit on the same cause of action was once instituted against these defendants, and was terminated by a general dismissal.

TAPPAN and B. T. WRIGHT, for defendants, rely upon the following points: That a decree, like a judgment, binds all parties and privies until the hearing and reversal by bill of review, 2 Johns. Ch. 205; 3 Ohio, 543; that general dismissal is a decree upon the merits, 7 Johns. Ch. 286; and that this fact is so stated in this bill that the objection may be taken by demurrer.

By the COURT:

The position is undoubtedly correct that a decree upon the merits binds all parties to it. But the defense should be made by *plea*. The demurrer admits the truth of the statements in the bill, in which it is alleged that the former suit was dismissed without any investigation of the ultimate *liability of the sureties. [461 If the defense be good in this case, it must be presented in another manner.

Demurrer overruled, and the suit is directed to stand for answer.

BENNET'S LESSEE *v.* MIAH WILLIAMS.

When notice of the pendency of a suit in chancery has been duly published, in conformity with the order of court where a suit is pending, the suit is to be considered as commenced and pending, and a subsequent disposition of the subject in dispute is a *pendente lite* purchase.

THIS was a suit in ejectment, reserved in the county of Delaware. It is presented to the court upon the following agreed facts:

In 1824, Jeremiah Williams, being the owner of three hundred and twenty acres of land, which are the subject of the present suit, conveyed them to Salsbury, by a valid deed. In February, 1826, Jeremiah Williams filed his bill to vacate this conveyance, and reclaim the title, on the ground of fraud. As Salsbury was a non-resident, the court of common pleas, to which the bill was referred, ordered that notice of its pendency should be published for nine weeks. This publication was duly made and completed by the 10th of May. On the 24th of May, two weeks after the termination of the nine weeks, Salsbury conveyed by deed to alienees, whose title is now held by the plaintiff. In 1827, Jeremiah Williams conveyed the land to the defendant, Miah Williams, by a deed of release without warranty. In 1828, the suit in chancery was tried, and the legal title of Salsbury was revested in Jeremiah Williams by the decree. The possession has always remained either in Jeremiah Williams or in the defendant. It is submitted to the court for whom judgment shall be entered upon this statement of facts.

WILCOX and O. PARISH, for plaintiff.

G. and J. R. SWAN, for defendant.

462] *LANE, J., delivered the opinion of the court:

The case shows that while Jeremiah Williams held the equitable right to the land, and was pursuing his legal title, he released his interest to the defendant. As he could only transmit the right he possessed, he conveyed an equity only. If the deed had contained a warranty, the subsequent acquisition of the legal title would have inured to the benefit of the defendant; but having no warranty, it works no estoppel, and no estate passes which can be recognized at law.

But the plaintiff must recover by the strength of his own title, not by the weakness of the defendant's. His title arises from Salsbury, who held the legal estate under a well-executed deed. But the defendant insists that the alienation from Salsbury to his vendees occurred during the pendency of the suit between Jeremiah Williams and him in relation to the land, and that therefore it passed no title.

No rule is better established, than that, during litigation, no change shall be made in the title affecting the rights of the parties. Hence arises the principle at law, that the judgment in a real action shall overreach an alienation after writ. The doctrine was adopted in chancery, by Lord Bacon, in analogy with this, and has since been constantly adhered to, that a decree binds all persons coming into the title, during the pendency of the suit, without leave of the court. The rights of Salsbury and his vendees are affected by the operation of this rule; and in respect to Jeremiah Williams, and all who claim through the decree, it invalidates the sale made by Salsbury, during the pendency of the bill, in which Williams was pursuing his legal interests. A doubt is started in the argument, whether a purchase made during a suit in equity will be holden void, except in a court of equity; but we entertain the opinion that in our state, where decrees in chancery by statute of themselves convey the land, the rule will work its effect, not only in chancery, but at law.

The plaintiff relies upon the positions, that at the time of Salsbury's alienation the suit was not, in a proper technical sense,

"pending." Where the process is by subpena, little *dif- [463
ficulty arises in ascertaining when the pendency of the suit begins; it is commenced by the service of the writ upon the party. 3 Ohio, 541. It is necessary to adopt some analogous rule, in those cases where the law provides a different manner of notice. Whenever the act is done by which the defendant is subjected to the jurisdiction of the court, it is a service of process, and the suit is commenced. When Williams complied with the order of the court, and made the prescribed publication for nine weeks, the suit is begun—the application of the rule commences, and no subsequent alienation can alter the rights of that plaintiff.

But the plaintiff insists that if he be a *pendente lite* purchaser, yet the present defendant shall enjoy no protection from the rule, because the conveyance, under which his title arises, is not absolutely void; that it is only invalid as to the plaintiff in the suit, or to one claiming under the decree. And this position, in a sense, we believe is correct. A conveyance *pendente lite* is undoubtedly good between the parties. The bare institution of a suit does not create an injunction upon alienation. The true interpretation of the rule is, that a conveyance during the suit shall not vary the rights of the *litigants; they* are exempted from the necessity of noticing titles acquired under these circumstances; to *them* such titles are as if they did not exist; for suits would be interminable and judgments without fruits, if one could impose upon the other the necessity of making new parties as often as he chose to convey. But to alter the conveyance is valid, subject only to such rights as are acquired by the decree. 2 Ves. & Bea. 200. A perfect legal title, therefore, passed by Salsbury's deed, which Jeremiah Williams alone was competent to question.

And whoever seeks the legal title to this land will find it in Jeremiah Williams. His equity was perfect at the filing of his bill; and the decree, by the operation of the statute, transferred to him the legal estate from Salsbury, and all claiming through him, by a conveyance *pendente lite.* We do not give any weight to the objection that the decree is not recorded in the registry of deeds. No statute, in terms, requires it—no settled practice furnishes evidence that the profession have deemed it necessary. Little inconvenience *can arise from its omission, since the [464
decree is found at the place where judgment liens must be sought for, before the title can be pronounced free from incumbrances—

and the sense of the legislature upon this point may be gathered from the statute now in force (29 Stat. 83, 3, 13), which, in requiring the registration of decrees, operating upon land beyond the county where they are rendered, impliedly dispenses with such record, in cases where land lies within it. The facts agreed, therefore, show an outstanding legal paramount title in Jeremiah Williams, and consequently it is not the plaintiff who is permitted to disturb the defendant's possession.

Judgment for the defendant.

5o 464
f64 512

McFeely's Lessee v. Moore's Heirs.

Rule in Shelley's case, 1 Rep. 104, declared to prevail in Ohio.

This was an action of ejectment, reserved in Hamilton county, and submitted to the court, on an agreed statement of facts.

Both parties claim under the will of John Hale. The tenements were devised by the following words: "To my son Walter, I give and bequeath, as also to Phebe his wife, the use of two lots; my will is, that Walter and Phebe aforesaid may have the use of these two tracts of land during their respective lives; but, at their decease, my will is, that these two tracts of land descend to their heirs, to whom I bequeath the same to have and to hold said tracts, to themselves, their heirs and assigns, forever." The plaintiff claims title from the heirs of Walter and Phebe Hale. The defendant's title arises from the grantee of Walter and Phebe Hale. If Walter and Phebe had a fee simple in the land, it is vested in the defendant; but if they had but a life estate, the plaintiff is entitled to judgment.

465] *O. M. Spencer, Jr., for plaintiff.

Storer and Fox, for defendant.

Judge Lane delivered the opinion of the court:

The determination of the present question depends upon the rule of construction to be applied to the will. It is assumed by

the plaintiff's counsel that is the manifest intention of the testator to give the devisees an estate for life only; and it is insisted that where the intent sufficiently appears, it is the plain duty of the court to give effect to it, and to hold that no larger estate passes. The defendant's counsel would apply the rule in Shelley's case to the interpretation of this will; by the operation of which, he claims an estate in fee in the immediate devisees. The rule is, where the ancestor takes a freehold, and by the same conveyance, whether deed or devise, is limited, either mediately or immediately, to his heirs, the word "*heirs*" is a word of limitation, not of purchase, and the fee vests in the ancestor. 1 Rep. 104. The very elaborate discussions upon the authority, effect, and extent of the rule, leaves no room to doubt that the estate created by the present will is fairly within its scope.

It is urged, however, that the rule has a feudal origin, and that policy does not require or permit its adoption in a community like ours. But it has been too long established to be abrogated by us. From the earliest period, we find it a settled rule of the common law. It is found in the Year Books; it is stated in the Institutes as clear and undisputed; it is recognized in the Abridgments of Fitzherbert and Rolle; it has descended, in the English courts, to the present time, unimpaired by attempted innovations, and flourishing in full vigor. It has been adopted in the United States. In Connecticut, Maryland, Virginia, South Carolina, and New York, it formed a part of the common law, and it continues to exist, as a rule of property, except where abolished by statute. If its policy be doubted, let the legislature be *called to act; but [466 if we should disregard a rule, which has prevailed so widely and subsisted so long, it would be an unfaithful interpretation of the law.

Judgment for defendant.

Harris *v.* Ohio Insurance Company.

The sixth rule of the Ohio Insurance Company, in relation to double insurance, extends to a case of subsequent as well as previous insurance on the same risks.

This was an action of covenant, reserved in Hamilton county. The facts may be found in the opinion of the court.

STORER and FOX, for plaintiff.

HAMMOND and N. WRIGHT, for defendants.

Judge LANE delivered the opinion of the court:

This was an action of covenant, on a policy of insurance against fire, upon goods valued at four thousand dollars, for the term of five months, from August 8, 1829.

The defendant asked oyer of the policy and of the conditions attached, the sixth of which is as follows: "6. Persons insuring property at this office must give notice of any other insurance made on their behalf on the same, and cause such other insurance to be indorsed on the policy; in which case, each office shall be liable to the payments of a ratable proportion of any loss or damage which may be sustained. And unless such notice is given, the insured will not be entitled to recover, in case of loss."

The defendants plead, that on October 31, 1829, the plaintiffs caused insurance to be made, of the same goods, at the office of the Cincinnati Insurance Company, of which they gave no notice to these defendants, nor did they cause the second insurance to be indorsed on the said policy. To this, the plaintiff demurred, and 467] the question presented *by this issue is, whether by the sixth condition, the plaintiff loses his right of recovery, in cases where he neglects to give notice and make the indorsement of *subsequent* insurers, or whether he is bound to communicate such insurances only as had been made before the date of the policy which he seeks to enforce.

In cases of double insurance, the law will not permit the insured to obtain double satisfaction, although he may collect payment of his loss from either. In such cases, when one insurer pays the whole loss, he is entitled to contribution from each underwriter, for his proportion of the sum paid, without regard to the dates of their respective policies. 3 Kent Com. 227; Phil. Ins. 326. To apprise the assurer of his right to claim a contribution from his co-insurers, is one object designed by the introduction of this condition.

Besides, it is the interest of the insurer that the assured should sustain a part of the risk, for if the insured be more than indemnified, if this do not tempt him to produce loss, it at least tends to relax the diligence which prevents it. Upon the diminution of

the risk, arising from the co-operation of the interest of the insured with his own, the assurer has a right to calculate; and if an event occur, by which this identity of interest is destroyed, many reasons concur to make it proper in time to require a knowledge of the fact from the insured.

These causes operate equally on the insured, in all cases of double insurance, whether prior or subsequent to the policy sought to be enforced. We feel, no doubt, that by the sixth condition, it was intended to exact this communication from the plaintiff whenever it occurred, and that this intention is sufficiently manifested from the transaction. The grammatical construction of the sentence will bear either interpretation, and consequently throws little light upon the matter. But the parties evidently designed to give the fact of double insurance very different character from any of the class which compose the representation. The object they had in view was "that each office should bear its proportion of the loss;" and the *insured*, in whose custody the policy remained after execution, were to cause the indorsement to be made. These considerations convince us *that the [468 plaintiffs were sufficiently apprised of their duty; that their omission to notify the second insurance is a kind of bad faith, which cuts off their remedy on the policy.

An objection is stated that the plea does not sufficiently show the second insurance was a double insurance, the one being upon the goods, and the other on the store and goods. The rule is correct that to constitute a double insurance, the same risks must be covered by the second policy, for the benefit of the same person. An insurance against one peril does not diminish the owner's interest as to other perils. If property be insured to its value against capture, the owner has the same amount of honorable interest against the perils of the sea. Phil. Ins. 326; 11 Johns. 238; 5 Serg. & R. 513. But where the second policy insures the same risks, for the benefit of the same person, it falls within Mansfield's definition, 1 Burr. 489, and is, to any extent, a double insurance. The plea, in the present case, shows the goods are protected by the second policy from perils by fire; it is therefore a double insurance of the same risks.

The plaintiff has leave, on motion, to withdraw his demurrer on the payment of costs, and to reply. 4 Ohio, 224.

WILLIAM KNOBB v. STEPHEN LINDSAY AND NATHAN LINDSAY.

Person arrested and in prison upon a criminal charge conveys to a third person, in fee, real estate worth two thousand five hundred dollars, renting for eighty dollars per annum, in consideration of the grantee becoming bail, and agreeing to pay the grantor an annuity of one hundred dollars per annum during life, not relieved against in equity, though grantor is aged and intemperate, there being no proof of fraud in the case.

THIS was a suit in chancery, reserved from the Supreme Court in the county of Hamilton.

The bill states that the plaintiff is an old man, ignorant and imperfectly acquainted with the English language. That in the beginning of March, 1830, he was committed to prison, upon the accusation of an infamous crime, and that Lindsay, pretending to assist him, agreed to become his bail if he would execute an agreement to mortgage his farm, containing two hundred and 469] eleven acres, and worth about *two thousand five hundred dollars, for his indemnity. That the agreement was made, the bail for five hundred dollars entered, and that on March 9, 1830, he executed and delivered to Lindsay what he supposed was the mortgage, and departed for Pennsylvania. That on his return he first learned the deed was absolute. That Lindsay took possession of the farm during his absence, and by collusion with his tenants, procured them to accept new leases from him.

The bill proceeds to state that at the date of the above deed Lindsay gave to Knobb an agreement, secured by a mortgage on the land, to pay him an annuity of one hundred dollars during his life; and a further instrument of writing was made, in which, after reciting the conveyance to Lindsay, the liability of Lindsay to pay the sum of five hundred dollars as bail, and the mortgage securing the payment of the annuity to Knobb, it is stipulated by Lindsay that if he will yet pay to Knobb one hundred dollars per annum for the first five years, and that he will afterward pay fifty dollars per annum, retaining fifty dollars per annum only until his advancements, as bail, shall be repaid.

The bill proceeds to aver that no bill of indictment was found against him, so that the recognizance of bail was never forfeit, that he is a man of feeble intellect, and at times insane. That the writings were not read to him at the time of their execution; that

the conveyance of the land was obtained under such circumstances that he is entitled to the aid of the court in setting it aside. He therefore prays that the deed may be canceled, and for general relief.

The answer of Stephen Lindsay admits the deed and the time of execution. It avers that he found Knobb lying under arrest, upon a criminal charge, by the procurement of his son, and that he became bail, at Knobb's solicitation. That Knobb was much exasperated at the steps taken by his son, and unwilling that his property should ever descend to him; and he therefore proposed to Lindsay to convey his farm for an annuity upon his life of one hundred dollars, which Lindsay agreed to give. The writings named in the *bill were designed to carry this purpose into [470 effect. They were read and explained to Knobb; they received some modifications at his instance, and were executed with his entire understanding and assent. Possession of the land and of the title papers was delivered by Knobb to Lindsay, and it was Knobb himself who canceled and destroyed the outstanding leases. He admits that he purchased the farm for less than its value, but avers that its price was materially affected by the general want of repair in the fences, and by the doubts upon its title, in consequence of a claim set up by Lemuel Taylor. The land was leased at eighty dollars per annum. He insists that Knobb, although not well acquainted with English, was a man possessing a strong mind and good sense; was sane; duly sober, and perfectly competent to contract, and that no fraud or ill faith was practiced to lead him into this arrangement.

Nathan Lindsay answers that he is a purchaser of a part of the land from Stephen Lindsay, and knows nothing of the original transaction.

The pleadings were closed by a general replication. Voluminous testimony was taken, which is noticed as far as necessary by the court in the opinion below.

STORER and FOX, for plaintiff.

STRAIT and HAWES, for defendants.

Judge LANE delivered the opinion of the court:

The precise ground upon which relief is claimed in the present

case is not very specifically pointed out in the bill. It is hardly insisted that the duress is such as to avoid the contract. Although the agreement to convey was executed while the plaintiff was in prison, yet it was a lawful imprisonment, and not produced by Lindsay, and a bond to procure a discharge, or for any other honest purpose, is not void. 2 Inst. 481. It was not unreasonable for Lindsay to annex to his offer of bail the condition that Knobb should secure him against the risk. And it seems that this 471] ground *of relief is wholly taken away by the execution of the stipulated conveyance, after his discharge from prison, when all restrictions upon his liberty were at an end.

Is it sufficiently proved that he was incapable of contracting? He is represented to be at times intemperate. Burdich says that while under arrest and on his way to prison he seemed depressed, cast down, and intoxicated, so much that he should not have deemed it right to have made a contract with him. Picklehamer alone represents him as having lost his senses after his liberation, "sometimes crying, sometimes preaching, sometimes cursing and swearing, during which he appeared sober." To explain this we need not raise the harsh presumption that he was following the advice he said he had received, "to act foolish that he might regain his land." The testimony fully shows that none of his acquaintance ascribe to him any other insanity than occasional intoxication.

There is no sufficient evidence that fraud was practiced upon the plaintiff. The arrest did not arise from the defendant, nor did he officiously press his aid upon the plaintiff; he lent his assistance at the solicitation of the plaintiff at an accidental meeting.

No false pretenses are shown as inducements to lead the plaintiff into this agreement. But it is said that he intended not to convey the land, but to mortgage it for Lindsay's indemnity. The proof to support this is of the slenderest description, consisting merely of the fact that while in jail, and before the agreement was made, Lindsay and Knobb told Mr. Fox that Lindsay had agreed to become the bail, and to take a mortgage on the land for indemnity. May it not be presumed that the parties changed their arrangements? The answer alleges that he designed to disinherit his family, and his situation renders this in the highest degree probable. That the agreement was not truly written is fully denied in the answer, and fully disproved by testimony. The bill

shows that on the day when the land was conveyed by Knobb, Lindsay gave to him a bond for the annuity, the payment of which was secured by a mortgage of the same land to Knobb by Lindsay. Can it be possible that this arrangement should have been made *unless the land had been conveyed; that Knobb [472 should have taken a deed from Lindsay unless he had transferred to him? What other consideration did Lindsay receive for the annuity? But the direct proof is full. Dennis, a subscribing witness, knows the deed was read and explained to Knobb, and he appeared satisfied. Foster, likewise present, says that on learning its terms he hesitated to sign the deed, but afterward consented. He told Eickleberger he had sold the land for the annuity; and Peter Knobb proves that before his father went to Pennsylvania he spoke of the sale to Lindsay, that possession was yielded, and the outstanding leases were destroyed by his consent.

There remains the question upon the inadequacy of consideration only. An estate worth two thousand or two thousand five hundred dollars, and producing eighty dollars per annum, although in bad repair, is sold for the annuity of one hundred dollars for the life of an intemperate man, who has passed the age of sixty. Efforts are made to show the difference of value is not so strikingly great; that a shade hangs over its title from the claim of Taylor; that a part of the value has been added since the contract by the general rise of property, yet we can not hesitate to believe, from the proof, that Lindsay acquired it for much less than its worth.

But this fact affords the plaintiff no ground for relief. It is a point well settled that mere inadequacy of price, although it may lead courts to abstain from executing agreements, is not a sufficient cause for rescinding, unless it be so gross as to afford proof of actual fraud. 2 Johns. Ch. 1; 14 Johns. 527; 3 Cow. 590; 3 Cow. 445; 2 Des. 636; 3 Des. 292; 4 Des. 651.

That degree of inadequacy does not exist in the present case. The parties were dealing upon a most obscure subject of traffic, the value of the life of an intemperate old man. Some of the witnesses, who seem honest, calculated its probable duration at twenty or thirty years. If witnesses entertain such extravagant opinions the parties may be excused in mistaking without the imputation of fraud. Besides, we may as well presume that

Knobb would then have preferred to bestow the benefit of his property upon the friend who delivered him from prison rather 473] than upon *the son who placed him there. The facts do not authorize the conclusion of actual fraud. If the contract had remained executory, perhaps we might not have decreed a performance, but there is no ground to rescind.

Bill dismissed.

LEVI NELSON *v.* ADAM C. FORD.

Action will not lie for the recovery of a contract penalty unless upon a specialty.

Formal introduction, and conclusion of a declaration or contract, not regarded after verdict.

Debt or covenant maintainable on a sealed obligation to pay a sum certain in commodities.

Debt can not be sustained on a stipulated penalty, in a lease not under seal, where the agreement is to pay, as rent, a part of the crop.

In action upon contracts, where there is one bad count, and several damages assessed, no judgment can be rendered for plaintiff.

FORD commenced an action against Nelson before a justice of the peace of Fairfield county, which was appealed to the common pleas, where Ford declared against Nelson in debt. The declaration contained three counts. The first stated that the parties, etc., by their writing obligatory, sealed, etc., submitted a controversy, etc., to the arbitration of, etc., and that for the performance of the award, they bound themselves each to the other in one hundred dollars. That the arbitrators did not meet and award, etc. That afterward the parties, by an agreement written on said obligation, and signed, but not sealed, referred the same matters to the arbitration of other persons named in the agreement, and also agreed to abide by and perform the award, as by the writing obligatory they had agreed to perform the award of the first arbitrators. That these arbitrators, in pursuance of the submission, etc., awarded in writing, under their hands and seals, that Nelson should pay Ford fifty dollars in corn at twenty-five cents per bushel. After laying a breach of the award by non-payment, the declaration stated, "whereby an action has

accrued to the said Ford, to demand and have of the said Nelson the said sum of one hundred dollars, in the said writing obligatory mentioned."

The second count is an agreement in writing, signed by the parties, but not sealed, whereby Ford agreed to lease certain premises to Nelson, for which Nelson agreed to pay him certain proportions of the crops raised by him on the premises. The agreement has a clause by which each binds *himself to the other in a penalty [474 of two hundred and fifty dollars for its performance. After the assignment of the breaches, it is stated "whereby an action has accrued to the said Ford to demand and have of the said Nelson the said sum of two hundred and fifty dollars."

The third count states that the submission, without reference to the writing obligatory, sets forth the award, its non-payment, and concludes as a count in assumpsit, "to the damage of the said Ford ninety dollars."

To this declaration the defendant pleaded *nil debet*. On the trial a verdict was found for Ford for fifty dollars, on which judgment was entered. To reverse which this writ of error is brought.

HUNTER, for plaintiff.

IRWIN, for defendant.

Judge COLLET delivered the opinion of the court:

The errors insisted on for the reversal of this judgment are:

1. That an action will not lie for the penalties demanded by the first and second counts.

2. That debt will not lie on the award.

3. That the third count is in case and not in debt.

4. That the second count is an agreement to pay a part of the crop raised on a farm, in kind, and debt will not lie for its non-payment.

The submission of the parties of their controversy to arbitration, by the deed set out in the first count of the declaration, by there being no award made, without the fault of either party, became void. The penalty of one hundred dollars was not forfeited. The second submission was in writing, signed, but not sealed, by the parties. It referred to the first to show the matter submitted to the second set of arbitrators, and the terms on which it was sub-

mitted. It must be construed as though the terms of the deed had been copied into it. It would then have been, as to the penalty, that for not performing the award, the party should forfeit one hundred dollars.

An action will not lie on a contract for the recovery of a penalty, 475] unless the action is a specialty, either a deed or a * recognizance. A penal sum is an amount greater than the value of the consideration, a forfeiture. In an action on a deed, the value of the consideration can not be shown to defeat altogether the action. Anciently, in an action of debt on a penal bond, the penalty was recovered and really made on execution, but since the principles of justice have been understood by the courts and people, and her dictates obeyed, the penalty is only nominally recovered, but no more than the value of the consideration, the condition of the bond can be collected of the obligor. In actions on contracts not under seal, no more than the value of the consideration, or damages sustained by the breach of contract, can be even nominally recovered.

The caption of a declaration in debt, "that the defendant render to the plaintiff the sum of," etc., is no part of the declaration, and on special demurrer, if justice require it, will be rejected as surplusage. 1 East, 62; 1 Saund. Pl. & Ev. 405.

So the clause in the count, "whereby an action has accrued to the plaintiff to demand and have of the defendant," etc., after verdict, will undoubtedly be rejected as surplusage. If the facts stated in the declaration are sufficient to sustain the action, it is a conclusion of law that the action thereby accrues, etc., and if they are not sufficient, the attorney's conclusion of "whereby an action has accrued," etc., is false, and of no avail. 2 Chit. Pl. 142, note; 1 Saund. Pl. & Ev. 405.

The submission and the award are set out in the first count of the declaration and a breach of the award. The award is that Nelson should pay Ford fifty dollars in corn, at twenty-five cents a bushel. On Nelson not paying according to these terms, an action accrued to Ford to recover of Nelson fifty dollars, a liquidated amount. Debt lies for a sum certain; for liquidated damages. 1 Chit. Pl. 101; Bac. Ab., Debt, note.

On the circuit this court has often decided that on a sealed bill to pay a certain sum, in trade generally, or in houses or land, or corn, either debt or covenant would lie. We see no good reason why debt should not be sustained on this award. The sum to be

recovered is ascertained; the measure of the recovery, the rules of evidence and of pleading *are substantially the same, [476 whether the action is debt or assumpsit. Rejecting the conclusion, "whereby an action has accrued to demand the one hundred dollars," the law supplies, whereby an action accrued to demand fifty dollars. We see no valid objection to this count.

The third count is on the award. It omits the common clause, "whereby an action accrued to demand," etc., and concludes as a count or declaration in assumpsit, "whereby the plaintiff has sustained damage, etc." We have just said that the law supplies, whereby an action accrues, etc., which would make it formal. After verdict, the objection can not be sustained by the court. 1 Saund. Pl. & Ev. 405.

The second count is on the lease not under seal, whereby Nelson agreed to pay Ford a proportion of the crop raised by Nelson on the leased premises. The penalty of two hundred and fifty dollars contained in this lease must, we have said, be rejected. The value of the rents are not stated in the lease, the damages are not liquidated, nor is there any provision, in any event, to pay their value in money. An action of debt, therefore, can not, on this lease be sustained. This count is, therefore, bad. The verdict was general. And the law or rule in such cases is, that the judgment must be reversed. Cowp. 276; 29 Ohio L. 80, sec. 116.

Lord Mansfield says of this rule of law: "I have exceedingly lamented that ever so inconvenient a rule should have been established as that, where there are several counts, entire damages and one count is bad, and the others not, this shall be fatal, upon the factitious reasoning that the jury has assessed damages on all, although in truth they never thought of the different counts, but the verdict was so taken from the inadvertence of counsel in the hurry of *nisi prius*. And what makes this much more absurd is, that it does not hold in the case of criminal prosecutions, for when there is a general verdict of *guilty*, on an indictment consisting of several counts, if any one of them is good, that is held sufficient." Doug. 730. Notwithstanding this, the practice is settled here, and out of our reach by being recognized by the legislature.

477] *JOHN WINTON, LESSOR, v. WILLIAM CORNISH.

Lease of a cellar and lower room in a building of several stories, gives the lessee no interest in the land—and if the whole building is destroyed by fire, all the lessee's interest is gone.

THIS was an ejectment, tried on the last circuit in Hamilton county. A verdict, by the direction of the court, was taken for the plaintiff; a motion was then made for a new trial, which was reserved for decision here.

It was proved on the trial that the lessor was the owner in fee of a lot and house, at the northeast corner of Front and Sycamore streets, in Cincinnati; that the house was of several stories in height, with a cellar underneath; that on August 29, 1830, he, by a lease, let to the defendant, for three years from the 14th of that month, "the store-room and cellar thereunder in the northeast corner of Sycamore and Front streets, in the city of Cincinnati," etc., at a rent of three hundred and fifty dollars a year, payable, etc.; that the defendant covenanted not to make any material alteration in the form of the room or cellar without the consent of the lessor; that the defendant was in possession of the store-room and cellar at the time; that the room is in the first story, measures about twenty-five feet by thirty, and is at the corner of the streets; that the other rooms in the house were rented to and occupied by others; that in June, 1831, the house was destroyed by an accidental fire, without the default of either party. It was also proved that the cellar was partly filled with rubbish from the burning of the house; that to this the defendant added, and built a small house over it, which occupies about the space of the room leased by him, not a greater, and that it is not higher than the ceiling of the room which he leased; that of this building he holds possession, and that before he erected it he was forbidden to do so by the lessor.

STARR and CASWELL, for the defendant, argued that the land under the room and cellar passed by the lease to the defendant, and that he has still a right to the possession, for his term, of the space filled by the room and cellar before they were destroyed by fire, and cited 1 Co. Lit. by Thomas, 234, 248, 280; Shep. Touch.

94; 2 Saund. 401; *Co. Lit. 56, 562; 1 Term, 701; 4 Cruise, [478 321; 6 Greenl. 436; 6 Mass. 67; 16 Mass. 238; 3 Johns. 44; 1 Dall. 210; 1 Term, 310; 4 Dane's Ab. 378; 3 Kent's Com. 371–374; 8 Cowp. 730.

STORER and FOX, for the plaintiff, contended that by the lease the room and cellar only passed, but no interest in the land; that the fire destroyed the room and cellar, and left nothing conveyed by the lease. They cited Story on Bailment, 275; Woodfall's Landlord and Tenant, 151.

COLLET, J., delivered the opinion of the court:

The word *land* includes not only the face of the earth, but everything under it or over it. He who owns a piece of land, therefore, is the owner of everything underneath in a direct line to the center of the earth and everything above to the heavens. No person can undermine or overhang another's land without violating his rights. 2 B. C. 18. The owner of the land can convey it, or the profits of it, for such terms and in such parcels as he thinks proper. He can grant the right to take all the minerals underneath, or those twenty feet below the surface only; to dig all the turf, to inhabit a cave, if there is one, to occupy a room in the third story, to occupy the second story, a room in the first story, or the cellar, or a part of the cellar. By such grants the land does not pass. When the mineral or the turf is exhausted, the grantee has no right even to enter the premises. When the cave is destroyed by a convulsion or otherwise, there is nothing that was granted remaining. It is so of the rooms or cellar of a house. The lessees of a middle story of a house are limited above and below as well as on the sides, yet the land is as necessary to sustain their part of the house as that below. Where the whole of the profits of a piece of land are granted to an individual the land passes. Such a grant manifests such an intention. When the profits are gone why retain the land? But when a part only of the profits are granted, the land does not in general pass, although livery is made. Co. Lit. 4, 6. By the grant of a whole house to an individual, unless there are productive *minerals under- [479 neath, the whole profits of the land on which it stands are granted, and the land passes. By the granting of the cellar the whole profits of the land underneath are not parted with, nor by

the granting of any one or two rooms when they are overhung by others. It is said by 2 Blackstone, 19, that by the term *land* anything terrestrial may pass, but by any other term nothing else passes but what falls with the strictest propriety within the meaning of the term used. It has been well said in argument that what passes depends on the intention of the parties, to be collected from the lease. 2 Bac. Ab., Lease, K.

The forms of leases for rooms in the upper stories and for cellars do not vary, that we know of. A clause that the form of the room or cellar should not be materially altered, would more likely be introduced into the lease of a store-room than of a room above. They would probably look upon a lease conveying a room for the same term, whether on one floor or another, as conveying the same interest. Whole rows of two, three, and four-story buildings, in the most important parts of a city, are sometimes at once destroyed by fire. Can the lessees of cellars, holding by leases such as this, cover themselves in their cellars and prevent the entry of their landlords to reconstruct the houses? Can the lessees of basement stories of public buildings, with leases such as this, when the edifices are destroyed by fire, roof the basement story and prevent the agents of the public from entering to reconstruct the edifice? It appears very clear to us that the parties to such leases do not so intend.

Upon the whole, the motion must be overruled, and judgment entered on the verdict.

480] *JOHN DEWIT, LESSOR, *v.* ELIJAH OSBURN.

A recognizance for the appearance of an individual to answer an accusation or as special bail, does not operate as a lien upon the land of the recognizors, until judgment on the recognizance, as in other cases.

THIS is an ejectment. The facts were agreed on by the parties, and it was submitted to the court on the last circuit in Fayette county, and reserved here for decision. The facts are, that Peter Harnes, on February 25, 1830, in the court of common pleas for the county of Fayette, entered into a recognizance in one hundred dollars, for the appearance of Adam Harnes to answer to an in-

dictment pending against him in that court. On May 20, 1830, the recognizance was forfeited; a *sci. fa.* was afterward issued on the recognizance against Peter Harnes from that court, and a judgment on it there obtained against him, on October 6, 1831. An execution issued on this judgment; the premises in controversy, situate in the county of Fayette, were levied on by the sheriff, by virtue of that execution; they were sold by the sheriff to Dewit, the lessor; the sale returned, confirmed, and a deed ordered by the court to be made by the sheriff to Dewit, which was made before the commencement of this action. The execution, and all the proceedings of the sheriff, and of the court in ordering the deed, are regular. At the time Peter Harnes entered into the recognizance, he was seized in fee of the premises. On September 17, 1830, he, for a valuable consideration, sold, and by deed duly executed, conveyed the premises to S. Jinks, who then had no actual notice of the recognizance. Jinks, on November 26, 1830, for a valuable consideration, sold, and by deed duly executed, conveyed the premises to Osburn, the defendant, who, at that time, had no actual notice of the recognizance.

G. SWAN and LOUGHBOROUGH, for defendant.

Judge COLLET delivered the opinion of the court:

Osburn is a *bona fide* purchaser of the premises, for valuable consideration, without notice, and before the judgment. The only question to be decided is, whether the recognizance was a lien on the lands in the hands of such a purchaser.

*Under the feudal system, lands could not be aliened by the [481 holder, without the consent of the lord, for thereby an enemy of the lord, or a person unable to serve him in his wars, might be put in possession of the land; neither was it liable for the debts of the holder, nor could he make it liable, unless for debts due the lord; for in collection of the debts a tenant might be introduced, the enemy of the lord, or one unable to perform his services; but it was held liable to the lord for debts due him, from the time they were contracted, 2 B. C. 57; 3 B. C. 420; for in collecting his own debts, he would take care that he got proper tenants, or if he retook the land, with its rents he could hire one, and as the tenant could neither alien nor lien, no subsequent purchaser or creditor could be injured by the lord's lien; hence, probably the form of

the recognizance to the king, the lord paramount, "to be levied of your goods and chattels, lands and tenements," etc. As the lords and people became more civilized, more agricultural, less warlike, and as commerce was introduced, the holders of land, it is not improbable, with the consent of the lords at first, acknowledged before the officers who took the king's recognizances, in the same form to their creditors for their debts; after some time they did so without his assent, and so it became common law that they could do so without the assent of the lord. The interest of the vassal in the feud, or land held by him, imperceptibly increased from a life estate to a fee; there was no other way by which land could be conveniently subjugated to a debt due to other than the lord; lands passed by livery without deed, but few of the people could read or write, but the owner with his creditor could go before a court or judge and acknowledge a recognizance.

Parliament to encourage trade and commerce, in 13 Edw. I. and 27 Edw. III., enacted the statutes merchant and staple, which authorized traders, by recognizances acknowledged before the mayor of a city, to secure their debts to one another by their liening them on their land, and pointed out the mode of execution. 23 Henry VIII. extends these provisions to all others as well as traders. 3 Bac. Ab., title Execution, B, sec. 3; 2 B. C. 160, 341. These recognizances in England authorize the recognizee to take the 482] rents and *profits of the land until the amount of the debt is received, but not to sell the land. A judgment and execution there does not authorize the sale of land. These statutes never were in force in this country. In England they were necessary; they enabled the people to bring a part of their landed capital into trade with facility; they made the unjust landholder, who refused to secure or pay the manufacturer or merchant, more inexcusable; they weakened the feudal grasp on land. Subsequent purchasers could be but seldom injured by the liens of recognizances; lands were not daily in the market there in the times of the Edwards and the Henrys as now here, nor are they yet. Creditors do not there look to the value of the land of the debtor as a means of payment, as they do here. The reasons for liening land, by recognizances, do not apply to us; our lands have always been allodial; no lord to be consulted before an alienation or mortgage could be made; our owners of land could draw, or have drawn, a mortgage

with less cost or trouble than it would be to acknowledge a recognizance before a court or judge; our landholder can cast his merchant's account, read or write his mortgage; his merchant or manufacturer is not a foreigner, against whom he is prejudiced, and in whom he has no confidence. Our lands have always been subject to sale on execution for the payment of the debts of the owner. Liens on these endanger the interest of subsequent creditors and purchasers almost as much as liens on chattels. Recognizances of no kind have ever been considered as liens. Who, when inquiring for liens, has asked the clerk for recognizances, either to the state or to individuals, as of special bail? The land of special bail, in England, is bound by the recognizance. 2 Salk. 564. Who asks the clerk for more than a list of judgments and decrees, their dates and amounts? Who, when he ascertains that there are no judgments or decrees in the courts, or conveyances or mortgages on the books of the register of deeds, is not satisfied that he has no other liens from which to apprehend danger.

That recognizances of any kind have not been considered by our legislature as liens is plainly inferable from various acts. By the acts of 1824 and 1831, regulating judgments and executions, 22 Ohio L. 108, and 29 Ohio L. 101, and the acts regulating *the practice of courts of chancery, the liens of judgments [483 and decrees are carefully defined; when they commence, and when they terminate. 29 Ohio L. 86, sec. 37; Id. 73, sec. 85. When the sheriff sells and conveys land on an execution, he conveys the title the defendant had when the judgment became a lien, 22 Ohio L. 112, and 29 Ohio L. 105, which is on the first day of the term in which it was rendered, whether the judgment is found on a recognizance or other evidence of debt. On an execution on a judgment, or a *scire facias*, or a mortgage against the mortgagor, the sheriff's deed conveys the title the mortgagor had when the mortgage was made. 22 Ohio L. 232; 4 Ohio, 500; 29 Ohio L. 84.

To provide for the preservation of deeds and mortgages, and to secure creditors and purchasers against imposition, the legislature have declared how they shall be executed, when and where they shall be recorded. In this respect they have said nothing as to recognizances; the acts requiring certain recognizances to be recorded is to preserve them, and that a *sci. fa.* may issue on them,

and a judgment be obtained in a court of record, but not to fix a lien otherwise than by a judgment. 22 Stat. 54; 29 Stat. 60.

By the act defining the duties of executors and administrators, 29 Ohio L. 236, when an estate is insolvent it is directed that the lands of the deceased shall be sold by the administrator, and that he pay, first, funeral expenses, costs of administration, expenses of last sickness, the sum allowed for the support, for one year, of the widow and children; second, mortgages and judgments rendered against the deceased as far as they were liens on the land; third, all debts not paid under the provision of the second class, whether judgments or parts of judgments on bonds or accounts, etc., to be paid in proportion to their amount; here liens are provided for, mortgages and judgments are enumerated, but recognizances are not mentioned.

That in England they were liens may be inferred from their form, "to be levied of your goods and chattels, lands and tenements;" but not so here; the form has been adopted by the officers and the legislature, because it was found in the books without regard to the original meaning. The same form in this respect is 484] prescribed for the recognizance to the *state to answer for a crime, for special bail in common pleas and Supreme Court, special bail in the justices court, for appeal from a justice, for stay of execution before a justice. 29 Ohio L. 201, 120, 161, 191, 192. By giving this form for bail in civil cases before a justice, the legislature certainly do not mean that the land of the bail is mortgaged thereby for the liability of the cognizor when the justice's judgment when finally rendered is no lien 1 Ohio, 318.

The interest of the state is sufficiently guarded without the lien; her object is not money, but to secure the appearance of the individual. The officers are to judge of the sufficiency of the bail, and will reject it if not good. The defendant's interest will not be endangered. If he has land and his bail are afraid of him, they can take a mortgage of him for their indemnity. If the land is aliened fraudulently, it is liable for the judgment on the recognizance; if *bona fide*, it is surely better that the recognizance should not be collected, than that an innocent purchaser, a stranger, should have to pay the amount. Judge Shippen, at an early period, in Pennsylylvania, determined that a recognizance did not there bind land. 1 Dall. 131.

Upon the whole, we are of opinion that the premises in the hands of Osburn, a *bona fide* purchaser without notice, could not be sold by the sheriff to satisfy the judgment on the recognizance. Judgment must be entered for the defendant.

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*DAVID YOUNG *v.* A. BUCKINGHAM ET AL. [485

The erection of a toll bridge is a public use, for which land may be condemned.

Where the journal of the court of common pleas contains entries showing a regular series of measures condemning lands for public uses, it is competent to prove the proceedings *in pais* by parol, where no complete record is made, and the original papers are lost.

Commissioners appointed to appraise lands to be condemned for public uses, the concurrence of a majority binds the minority.

THIS cause was adjourned here for decision from the county of Muskingum. It was an action of trespass, *quære clausum fregit*. Declaration, for breaking and entering plaintiff's close. Plea, general issue, with notice of the special matter set forth in the evidence offered by defendants as hereinfter stated.

On the trial, the defendants admitted that before and on January 21, 1812, John McIntyre was seized in fee of the undivided half part of the *locus in quo*, and continued seized until December 1, 1814, when he conveyed the same to one Noah Zane, who conveyed the same to the plaintiff on January 1, 1823, and that after that time, and before the commencement of this suit, defendants made necessary repairs on the bridge, situate on said premises as hereinafter described, and that the plaintiff, therefor, is entitled to recover, unless the special matter offered in evidence by defendants constitutes a defense of the action.

The defendants then gave in evidence the act of the general assembly of the State of Ohio, entitled "an act to authorize Moses Dillon and his assciates to erect a toll-bridge over the Muskingum river," 10 Ohio L. 51, and the minutes of the court of common pleas of Muskingum county, as follows:

"August 18, 1813. The petition of Moses Dillon and his asso-

ciates was presented, and ordered that John McIntyre have notice of the pendency of said petition until Friday morning."

"August 20, 1813. This day the court have appointed Samuel Sullivan, Samuel Thompson, and Seth Adams, commissioners to appraise the land set forth in the petition of Moses Dillon and his associates, agreeable to said petition. Protest against the same filed, John McIntyre having had notice that said petition of M. Dillon would be presented. The appraisers appeared in court and took the oath required by law. And ordered that they report by to-morrow morning to this court."

486] "August 21, 1813. This day the commissioners who *were appointed to view and appraise certain lands set forth in the petition of Moses Dillon and his associates, as belonging to John McIntyre, appeared in court and delivered in their report in writing, and the report of two of them, viz., Samuel Sullivan and Samuel Thompson, was admitted, and on motion affirmed by the court as a legal report in this case; and the report is ordered to be filed. And the report of the third, viz., Seth Adams, rejected."

The defendants then offered to prove that the said petition and report have been lost or destroyed, and that there is no entry relating thereto in any of the books or records of said court, except the minutes before stated. That the said premises were and continue necessary to the erection and support of said bridge, and that the said petition was filed before the said Dillon and his associates took possession of the said premises, and further offered to prove by parol that the said petition and prayer thereof were in conformity to the said act, and set forth a description of the said premises as necessary for the purposes specified in section 2 of the said act, and that the commissioners appointed by the court were freeholders, and that the said commissioners, after being sworn, all proceeded together to value and appraise said premises, and that the said Sullivan and Thompson did appraise the same at the sum of two hundred and sixty dollars, and the said Adams at the sum of one thousand five hundred dollars, which reports were returned to the court and acted upon by them as stated in the minutes; and that before the said Dillon and his associates entered on the said premises they tendered to the said McIntyre the said sum of two hundred and sixty dollars, which he refused to receive, and that the said Dillon and his associates then proceeded to erect said bridge, and completed the same within the time lim-

ited by the said act, and have ever since maintained the said bridge, and that defendants are the assignees of the said Dillon and his associates; all of which testimony the court rejected.

The defendants then offered to prove that after the passage of the said act and before the said Dillon and his associates took possession of the said premises, the county commissioners of Muskingum county established a county road over the same, running to and over the river; that the *bridge was built by the [487 said Dillon and his associates on the same, and the said bridge has ever since been used as a public highway, subject to the payment of toll to the defendants and those through whom they claim, and that they have ever since received toll from passengers, but the place of receiving toll is not on the premises claimed by plaintiff, and that a bridge is the best mode of crossing the river at that point, and admitting that the Muskingum river is navigable.

Which testimony the court rejected, and a verdict was rendered for plaintiff.

A motion was made by defendants for a new trial on the ground that the testimony offered by them should have been received, which motion was reserved for decision at the court in bank.

The defendants contended:

1. That as the subject matter of the appraisement was of a public nature, the concurrence of two of the commissioners is sufficient.

2. The decision of the court of common pleas in accepting the report is conclusive until reversed.

3. That the establishment of the road by the county commissioners, and the act of the legislature, authorized the erection of the bridge and the taking of toll.

4. That the erection of the bridge is not inconsistent with the public right of way, but a furtherance of it.

5. That the use of the highway for so long a period gives a right of way which the owners of the fee can not question.

6. That as the original grantees were in possession of the bridge before the title of the plaintiff accrued, the action of trespass can not be maintained.

STILLWELL, for defendants.

GODDARD, for plaintiff.

Judge LANE delivered the opinion of the court:

488] *The subjects of evidence offered by the defendants profess to be a proceeding of the court of common pleas of Muskingum county, carrying into effect the provisions of a statute, entitled "an act to authorize Moses Dillon and his associates to erect a toll-bridge over the Muskingum river," 10 Ohio L. 51, by which the right to use the land in question, then owned by McIntyre, was given to Dillon, in the erection and occupancy of a toll-bridge. The form, consequently, which the objection must assume, is, either that no authority is shown to appropriate the land to this purpose, or that this authority has been so defectively executed that no such appropriation is made.

That the legislature may lawfully create the franchise of erecting a toll-bridge we have no doubt. It is as much an object of public concern as a turnpike road or a highway. It follows that private property, if necessary for this purpose, may be taken from the owner, due provision being made for his compensation.

Section 2 of the statute is designed to secure the rights of the proprietor of the land. It is there provided, that on the petition of Dillon to the court of common pleas, a valuation of the property necessary to be taken shall be made by three commissioners, whose report shall be entered of record in the office of the clerk, and the amount paid, before the property shall be appropriated to the use of the bridge.

The first objection made to the form of the proceedings is, that "it has never been entered of record." The original petition and report are not to be found, and no entry of proceedings has been made, except upon the journals of the court; and the question now made is whether the journal of the court is a record, so that entry there will satisfy this requisition. It is said that a distinct record of all the proceedings, in relation to this application, shall be made on the "complete records" of the court; that the judgment book in England is not evidence. 5 B. & P. 474. This question, in our opinion, must be determined by the practice in our state. By our statute, the journal of courts is required to be kept, and in providing that acts of the court are of no validity,

489] until entered there, it is implied that an *entry on the journals is all that is indispensable to make an act of the court effectual. Hence judgments are good before the complete record is made; and in the practice of many clerk's offices, no complete

record is deemed necessary, except of litigated suits. The only evidence of the doings of the court, in this case, is found in the journals. It is true that the entries in the journal are not any part of the record in the case, 1 Ohio, 268; but the book is one of the records of the court, containing the necessary materials to make the complete record, and "when all is done to authorize the recording officer to record, it is in law considered as recorded, although the manual labor of writing it in the book, kept for that purpose, has not been performed." 4 Ohio, 83. The objection, therefore, in our opinion, is not sustained. The proof offered shows the action of the court, in a matter over which they possessed jurisdiction, and consequently must not be collaterally questioned in another person. 1 Pet. 540.

The statute requires that the land shall be valued by three freeholders, and the assessment paid, before it can be taken for the bridge. The proceedings of the court show the valuation made and the amount tendered, but that although all the appraisers were present and acting, that two only united in the appraisement. It is objected that the dissent of one invalidates the appraisal, for it is insisted that a strict execution of powers must be shown. 3 Johns. Cas. 107; 1 Burr. 377; 4 Burr. 2244; Cowp. 26; 7 Term, 363. The determination of this point depends upon the nature of the powers to be executed by the commissioners. In the execution of a power delegated for purposes merely private, it is necessary that all should concur in the act; as in cases of trustees, arbitrators, etc. But if the persons be intrusted with powers in some respects of a general nature, or for public objects, if all are acting, a majority will conclude the minority, and their act is the act of the whole. Co. Lit. 181; 6 E. B. & E. 228; 6 Johns. 39. It is evident that this power was confided to these commissioners for public objects, since the taking the land from McIntyre can be justified upon no other ground than that it was demanded by public interest.

*It is further objected that the law, section 2, requires no- [490
tice to be given to the *owner or owners* of the land proposed to be taken, and that the case shows notice to McIntyre only, who held but an undivided moiety. But the plaintiff holds the estate of McIntyre, and is bound by what bound him; and it is plain he sustained no injury, since his interest was the subject of appraisal;

and especially has he little cause to complain, if, as is possible, he was taken to be the sole owner of the land.

We are satisfied the evidence was improperly rejected; and that a new trial be granted, the costs of which must abide the event of the suit.

THE COMMISSIONERS OF THE COUNTY OF CLERMONT v. SAMUEL ROBB AND JAMES FERGUSON.

Appeal lies to the court of common pleas from the decision of the county commissioners, on a contract to erect a bridge.

When, upon appeal, the court order money to be paid, that order must be directed to the auditor, not to the commissioners.

Question, whether the terms of a contract are dependent or independent, to be determined upon evidence, showing the contract and the intention of the parties.

THIS is a *certiorari* to the court of common pleas for the county of Clermont. It appears from the record that the commissioners of that county, and Robb and Ferguson, on December 8, 1829, agreed that Robb and Ferguson should find the materials for, and construct a bridge across the east fork of the Little Miami river, at Batavia, in that county, according to a plan delivered to them by the commissioners; that the bridge should be completed in a workmanlike manner, by December 25, 1830, for which the commissioners agreed to pay them twenty-eight hundred and thirty-three dollars, in three equal installments; the first, on the first Monday of March, 1830; the second, on the first Monday of June next after, and the third, *on the completion of the bridge*, on December 25, 1830. Robb and Ferguson, at the time the contract was made, gave a bond, with security, to the commissioners to perform it. The construction of the bridge was publicly let to the lowest 491] bidder; Robb and Ferguson took it as the *lowest bidders. The commissioners paid Robb and Ferguson the first and second installments, and a small part of the third. Robb and Ferguson completed the bridge, as they alleged, according to their contract, and, at the instance of the commissioners, furnished some materials and did some work on the bridge not within the contract, after

which, and after December 25, 1830, the commissioners met to examine the bridge and to receive and determine the account of Robb and Ferguson for constructing it. When the commissioners had so met, Robb and Ferguson presented to them their account for the balance of the third installment, and for the additional materials and work, amounting together to more than nine hundred dollars, which the commissioners refused to allow; from this decision of the commissioners, Robb and Ferguson appealed to the court of common pleas for that county, and gave the notice and bail required by the statute to perfect their appeal.

At the April term of the court of common pleas, 1830, the next term after the appeal was taken, the cause was heard by the court, and the court allowed the account of Robb and Ferguson for the balance of the third installment and for the additional materials and work together (nine hundred and sixty-three dollars and sixty-five cents), and ordered that the commissioners should, within twenty days, on the demand of Robb and Ferguson, deliver to them an order drawn on the county treasurer in their favor for that sum. On the trial, the commissioners moved the court to dismiss the appeal because the cause was not appealable, which was overruled.

The court also determined that the agreement of the commissioners to pay the third installment was not dependent on the completion of the bridge according to the contract, but an independent agreement, and, without other evidence than the contract, ordered the balance unpaid on the third installment to be paid. To these opinions of the court the commissioners excepted, and made the contract a part of their bill. To reverse these proceedings this writ is brought. It is submitted without argument.

FISHBACK, for commissioners.

*T. MORRIS, for Robb and Ferguson. [493

COLLET, J., delivered the opinion of the court:

The act establishing boards of commissioners, 22 Ohio L. 263, and the act defining the duty of county auditors, 22 Ohio L. 267, were in force when these proceedings were had. By section 12 of this last-named act it is made the duty of the county auditor to

allow all demands justly chargeable to the county, except such as are by law to be allowed by the commissioners or the courts of the county, and to draw orders on the county treasurer for all sums allowed by himself, or the commissioners, or the courts. By section 7 of the first-mentioned act, the commissioners are authorized to contract for the building or repairing of bridges, and the auditor is forbid to draw on the county treasurer for the payment for anything done to a bridge under such contracts until the commissioners order him to do so. Section 21 of this act provides, "That if any person or persons shall conceive him or themselves injured by the decision of the commissioners in any case, such person or persons may, within fifteen days, appeal to the next court of common pleas," etc., "and the said court shall, at their next session, hear and determine the same." By section 7 the commissioners are required to decide on the claims of persons who have built a bridge under a contract with them; and by section 21 of the same act, an appeal is given *in all cases* from the decision of the commissioners. We can see no reason to doubt the right of Robb and Ferguson to take this appeal.

The court erred in the manner in which they made the order for payment. The auditor is required to draw orders on the county treasurer for all sums allowed by the court; after the appeal, the right to determine on the claim of Robb and Ferguson was vested in the court. When they determined, it became the duty of the auditor to draw on the county treasurer for the sum the court allowed to be due from the county. The order of the court, therefore, should have been to the auditor, and not to the commissioners.

453] *As to the opinion of the court that the agreement of the commissioners to pay the third installment was independent, and not dependent on the completion of the bridge, and in consequence adjudging them to pay that installment without other evidence than the agreement, it seems to us that there is error here. Whether an agreement or covenant is dependent or independent is determined by ascertaining from the contract or contracts the intention of the parties; there is nothing technical in it. 1 Wheat. Selw. 94, 388; 1 Ohio, 330. The parties have a right to make their agreements dependent or independent, and as they make them the courts are bound to enforce them. Our constitutions forbid the legislature to vary or impair the contracts of parties. In the

case of Cunningham *v.* Morrell, 10 L. R. 205, the court say, "A mechanic generally stands in need of advances from time to time in aiding him to procure materials to carry on his work, and the employer, if prudent, will generally reserve a considerable payment until the work be completed, and to depend on its completion. But if all these payments can be demanded without performance, merely because a part of them were to be made as the work advanced, it would be making the intention of the parties subservient to technical rules." In this case the commissioners, in December, 1829, proposed to have a bridge of a particular description built by December 25, 1830; that they would advance one-third of the price by the first Monday of March, as early as the bridge could be commenced; one-third more on the first Monday of June, before there would probably be a stone laid toward the erection of the bridge. These two payments were to be made without regard to the progress of the work. The remaining third was to be on the completion of the work on December 25, 1830, the day on which the undertaker was, by the contract, to have it completed. Why say, they would pay on that day, *on the completion of the bridge*, if they intended to pay on that day if it were not completed? The commissioners proposed to advance liberally to the undertaker; they did advance nearly two thousand dollars; they could not tell who would be undertaker until the bidding closed. To secure the county, they wisely required of him, whoever he might be, bond *and security well and sufficiently [494 to construct the bridge. They also prudently provided that one-third of the price should not be paid until the bridge was *completed.* The court should have heard the evidence as to the completion of the bridge, and the manner in which it was completed before they decided; and have allowed such sum on that hearing as would have been just between the parties, regarding the contract. Wheat. Selw. 58; Bull. N. P. 139.

The judgment must be reversed, and the cause remanded to the court of common pleas for further proceedings.

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Lessee of Ludlow's Heirs v. David E. Wade.

Case of Ludlow v. Johnston reviewed and affirmed.

Loose and vague proceedings of the courts in the first stages of the territorial government, to be sustained if possible, consistent with principle.

The power of an administrator to sell the lands of his intestate is derived from and dependent upon the statute that creates it. Though an order of court be made for carrying the law into effect, yet, if the statute be repealed before the order is executed, its effect is at an end, and no valid sale can be affected.

An order of court, authorizing the administrator to sell the lands of his intestate, remaining unexecuted, is not a "*suit or prosecution pending*," within the saving clause of the general repealing law of February 22, 1805.

This was an action of ejectment reserved for decision here from the county of Hamilton, upon a motion made by the defendant for a new trial. The case is presented in the subjoined statement of facts, drawn up and filed, at the trial, by the direction of the court:

This cause came on for trial before a jury, at the term of May, 1831, before this court, when the plaintiffs gave in evidence a deed from Jonathan Dayton to Israel Ludlow, covering the premises in question, dated May 1, 1803. Also, a copy from the record of deeds of the county, of a deed from William H. Harrison and John C. Short to Jonathan Dayton, covering the premises in question, dated October 31, 1818. Also, the last will and testament of John C. Symmes, the patentee of the Miami Purchase, and the testimony of Hezekiah Flint, who proved that Israel Ludlow claimed the land in question as early as the year 1799, and offered to sell it as his own; and that the defendant had declared that he purchased the land in question of the administrators of said Israel Ludlow. It was admitted that Israel Ludlow died January 21, 1804, that the lessors of the plaintiffs are his heirs at law, and were minors at the time of his death, and that the defendant was in the 495] possession of said *premises at the time of the service of the declaration, and had been since the year 1806. It was admitted that the said James C. Ludlow was born in the year 1798; said Martha C. Dudley, wife of Ambrose Dudley, was born in the year 1800; said Sarah Bella Garrard, wife of Jeptha D. Garrard, was born in the year 1802, and said Israel L. Ludlow was born in May, 1804; and the plaintiffs there rested their case.

The defendant then offered in evidence the transcript of the court of common pleas of the county, containing the appointment of the administrators of Israel Ludlow, and an order of the court of common pleas of May, 1804, directing said administrators to sell lands, in these words:

"Administrators of Israel Ludlow, deceased, exhibit an account current of said estate. John Ludlow and James Findlay, two of the administrators sworn, and pray order to sell the real estate to satisfy the debts, etc. Court grant the prayer of the administrators, excepting and reserving the farm and improved lands at Cincinnati, together with the houses and lots in Cincinnati."

And also a deed from said administrators, to the defendant, for the tract of land in question, dated March 25, 1807. And also offered proof that the estate of said Israel Ludlow was largely indebted at the time of his death; that one judgment in the court of common pleas of said county was standing against him at the time of his death; that another judgment was recovered against the estate between May, 1804, when the above order was entered, and January 1, 1805; and that several other valid claims against the estate of said Ludlow were presented to the administrators for payment, before and after the order of May, 1804, and payment thereof was urged. That after the order of May, 1804, the administrators promised the holders of the judgments and claims aforesaid, that if they would give time, and delay pressing the collection thereof, that the same should be satisfied out of moneys to be raised by virtue of the order aforesaid. And relying upon such promises, and on the faith thereof, the holders of said claims and judgments, after the making of said order, and before January 1, 1805, did give time to said administrators, on the said claims and judgments, and delay the collection thereof, until 1808. *And the said judgments and claims were afterward satis- [496 fied by said administrators, out of the proceeds of the sale by them of the land in question. The defendants also offered in evidence the accounts of the said administrators, filed in the court of common pleas, in the progress of the settlement of that estate. To the foregoing evidence, offered by the defendants, the plaintiff, by their counsel, objected; and the said objection was sustained by the court, and the whole of said testimony overruled. And thereupon the court directed the jury to find a verdict for the plaintiffs. And now the defendant moves the court for a new trial, for the

reason that the court erred in overruling the testimony as above stated."

The land in controversy was sold, under the order before recited, by the administrators in the year 1806, to the defendant. The law under which the order was made was repealed in February, 1805, to take effect June 1st of the same year. No other law enabling executors or administrators to obtain authority to sell a decedent's lands was enacted until February, 1808.

The plaintiffs maintained that the repeal of the law abrogated the effect of the order and power to sell, and that the sale was consequently unauthorized and void.

The defendant contended that the order was in the nature of a judgment, and could not be affected by a repeal of the law, after it was made.

He contended, also, that the saving clause of the repealing law embraced the case and preserved the effective force of the order.

In support of the motion for a new trial, upon these grounds, the case was most elaborately argued by N. Wright, Storer and Fox, E. King, B. P. Wilcox, and Gaines, for the defendant; and by Hammond and Garrard against it, for the plaintiffs. The opinion of the court reviews, at large, the arguments and authorities.

Judge HITCHCOCK delivered the opinion of the court:

The questions presented for decision in this case have hereto-
497] fore been submitted to the court in a variety of shapes, *in several actions which have been prosecuted, growing out of the settlement of the estate of Israel Ludlow. Heretofore it has been unnecessary to decide them, and the court have carefully avoided forming a definite opinion upon them, until necessity should require it. Such necessity now exists, and we are highly gratified at the more than ordinary efforts which have been made, by the eminent counsel in the case, to aid and assist us in coming to a correct conclusion.

In the case of the Heirs of Ludlow *v.* Johnson, 3 Ohio, 353, this court decided, together with other principles arising in the case, that the law of 1795, "for the settlement of intestate estates," was the first law of the territory or state giving authority to administrators to dispose of the real estate of their intestates, and the only one giving this authority, previous to June, 1808; and that the law

was repealed and ceased to have effect from and after the first day of June, 1805.

The case was decided after mature deliberation, and after every reflection had been bestowed upon it, which the importance of the subject and the value of the property in controversy demanded. The decision was concurred in by all the members of the court then present. Since that decision the same questions have been presented in a variety of aspects, and the principles of that decision have been considered as the settled law of the state. All the members of the court, as now instituted, are satisfied with those principles. So far, then, as any point is made in this case which was decided in the case referred to, it will not be particularly examined, but considered as settled by the authority of that case.

Three questions not heretofore directly decided are now presented to the court for consideration:

1. Is the order of May, 1804, under which the land in controversy was sold, of such a character that the purchaser can protect himself under it?

2. The order for sale having been made in 1804, and before the law of 1795 was repealed, what effect will that repeal have upon those sales which were made subsequent to the repeal?

3. What effect can be given to the saving clause in the *general repealing law of February 22, 1805, so far as respects cases like the one now before the court? [498

By the counsel for the plaintiffs, it is contended that the order of May, 1804, is void, and therefore that the defendant can not protect himself under it. The subject was hinted at in the case of Ludlow's Lessee v. Johnson, but the argument was not pressed. In the decision of that case the court considered the order as sufficient to protect a purchaser, without examining very specifically its terms, or the arguments which might be urged against it.

The law of 1795, Ohio L. L. 331, under which this order was made, provides that "if any person or persons should die intestate, being owners of lands or tenements, within this territory, at the time of their death, and leave lawful issue to survive them, but not a sufficient personal estate to pay their just debts and maintain their children; in such case it should be lawful for the administrator or administrators of such deceased, to sell and convey such part or parts of said lands or tenements, for defraying their just debts, maintenance of their children, and for putting them apprentices,

and teaching them to read and write, and for improvement of the residue of the estate, if there be any, to their advantage, as the orphans' court of the county where such estate lies, shall think fit to allow, order, and direct, from time to time."

In the next section it is provided that no lands contained in marriage settlement shall be disposed of contrary to the form and effect of the settlement. That no sale shall be allowed before the "administrators requesting the same do exhibit one or more true and perfect inventories and conscionable appraisement of all the intestate's personal estate whatever; as also a true and just account, upon his or her solemn oath or affirmation, of all the intestate's debts which shall be then come to his or her knowledge, and if thereupon it shall appear to the court that the intestate's personal estate will not be sufficient to pay the debts and *maintain the children*, until the eldest attains the age of twenty-one years, or to put them out to be apprentices, and teach them to read and write, then, and in *every such case, and not otherwise*, the court shall *allow* such administrator to make public sale," etc.

499] *This is the law which first, in this state or territory, authorized the administrator to interfere with the real estate of the intestate. It will be seen that the legislative authority were extremely careful in specifying the circumstances under which this interference should be had, as well as in prescribing the course to be pursued before the orphans' court had the power or jurisdiction to "*allow*" a sale. The object does not seem to have been so much to provide for the payment of debts as to provide for the maintenance and education of minor children. Unless the decedent had "issue," according to section 7, the section above first recited, power is not given to the administrator to dispose of real estate. And, according to section 8, this power is restricted unless the children are all under twenty-one years of age. Giving this law a natural construction, let a person die ever so much in debt, and leaving ever so much real estate, but leaving no issue, that real estate could not, through the agency of the orphans' court, be appropriated to the payment of his debts.

At the present day such a statute would not, probably, be very acceptable to the people of Ohio; but we must take it as it *was*, not as we *now* suppose it ought to be. This statute was adopted from Pennsylvania, and I believe the courts of that state have construed it as extending to *all* intestate estate, as well where there

was not as where there was issue. Justice might require such construction, but the words of the act would scarcely seem to warrant it.

Before the court can act, the administrator is bound to present two inventories of the personal property and "conscionable appraisement." He is also bound to present an account of debts due from the intestate, as far as the same may have come to his knowledge, verified by his own oath or affirmation. It is objected, that the order in this case does not show these facts. Neither does it show that there were any minor children or other issue left by the intestate. Neither is there any other evidence of *record* to show these facts. Nor anything from which it can be inferred that the personal property was not sufficient to pay all debts. The order is further objected to on the ground of vagueness and uncertainty.

*It is in these words: "The administrators of Israel Lud- [500 low, deceased, exhibit an account current, and pray the court to issue an order for the sale of real property, etc. John Ludlow and James Findlay sworn in court. The court order so much of the real property sold as will meet the said demands, except the farm and improved lands near Cincinnati, together with the houses and lots in Cincinnati." This order is certainly very vague and indefinite, and it is difficult to get over the objections raised by the plaintiff's counsel. It ought, unquestionably, to have appeared somewhere upon the record, that these circumstances concurred, without which the court has no power to "*allow*" the administrator to sell. These circumstances probably existed and were made known to the court. It would have been far better, however, that they should have appeared of record, either in the form of an application to the court as the foundation of the order, or in the order itself. Were this a proceeding of the present day we should hesitate to pronounce it irregular and void, as being too indefinite and loose to protect an individual who had purchased in pursuance of it. But it must be recollected that these proceedings were had at a very early period of our judicial history; and experience teaches us that we must view these early proceedings with a more favorable eye than those of more modern date. Such has been the course heretofore adopted (3 Ohio, 272), and we do not feel inclined to depart from it.

Nor has it escaped the notice of the court, that the probate busi-

ness, in some parts of the state, and particularly in the county of Hamilton, was at an early period conducted in a very loose manner. Few, if any, of the orders for the sale of real estate were regular, perhaps not so much so as in the present case. Yet lands were sold in many instances by administrators. These lands have passed into the hands of subsequent purchasers. They have improved in their condition and risen in value. It would be impossible, therefore, even to conjecture the immense injury which would be done by holding this order invalid. Although such has been the irregular manner of transacting the business, still it is to be 501] presumed that little, if any, injustice has been *done. Lands of intestates have been sold, but the avails have been applied to the payment of their debts. From these considerations, and we are frank to say that it is from these consideration alone, we are inclined to hold this order valid. It was made by a court having, under certain circumstances, jurisdiction of the subject matter, and we will presume that those circumstances existed and were made known before the order was entered of record.

I come next to consider what effect the repeal of the law of 1795 would have upon sales made after that repeal, but in pursuance of the order of 1804.

In order to arrive at a certain conclusion upon this question, it is necessary to inquire into the character of an order of this description. It is strenuously argued by the defendant's counsel that it assimilates itself to a judgment or decree of a court; and, going upon this hypothesis, that the repeal of a law could not affect it, unless clearly so expressed by the repealing law itself. If the premises are true, this consequence will follow.

So far as the interests of purchasers are concerned, this court have ever considered these orders of equal validity with judgments. 3 Ohio, 257, 561, 562; 4 Ohio, 130, 131. As a purchaser from the sheriff need not look behind the judgment, neither is it necessary for the purchaser at the administrator sale to look behind the order of sale. If the court have jurisdiction of the subject matter, this is sufficient.

But does the analogy hold beyond this? It is true, in the case of Goforth's Lessee *v.* Longworth, 4 Ohio, 131, the court say, in speaking of such an order, "this act to be performed by the court is essentially of a judicial character; a judgment is to be made up and pronounced; and this judgment is the foundation of the ad-

ministrator's or executor's power to sell. To see the applicability of this language, it is necessary to look at the facts of the case then under consideration. The defendant relied upon a title derived from an administrator's sale, but produced no order of sale. The question to be determined was, whether without such order the sale could be sustained. By the court it was held that it could not. And it will be found, by an examination *of [502 all the statutes upon the subject, that an administrator could at no time sell without the approbation of the court. The law makes provision for the sale, but leaves it with the court to ascertain whether there is such a combination of circumstances as will under that law justify a sale. Without such order the sale would be void. The order, then, is essentially necessary; it is the foundation of the power to sell. But without a law authorizing the sale the order itself would be void. It would lay no 'foundation' that would justify the execution of such power. Every order of court to extend may be considered as a judgment. But it is in the character of a final judgment that an order of sale must be considered, or the consequence will not follow which is contended for by the defendant's counsel."

The object of a judgment is to settle conflicting rights between parties—to render certain that which before was uncertain. And whenever a party recovers a judgment, a right is vested in him to receive that which he has recovered. This right can not be taken away by implication, and it may well be doubted whether it would be in the power of the legislature to divest him of it.

Now what right is settled by an order to sell land? What does the administrator gain by it? It may enable him the more readily to settle the debts of the intestate. But to him it is immaterial whether those debts are paid by property passing through his hands, or by property which passes to the heir, and in his hands is charged with the payment of those debts. An administrator who acts in good faith can never be charged beyond the amount of assets which came to his hands. And if the law will not permit him to dispose of the real estate, he has nothing more to do than to dispose of the personal and distribute the avails among the creditors or heirs, as the case may require. Neither do the creditors acquire any right in consequence of such an order. So long as the realty is subject to the payment of the debts of a deceased person, they have a claim to have their debts

satisfied out of that estate. But whether they shall obtain that satisfaction in one mode or another is a different matter. Further, in cases of this description, they are in no shape parties to the 503] proceedings. It seems clear to me that this *order can in no shape be assimilated to a judgment between litigant parties, except so far as a purchaser is concerned.

Counsel for the defendant seem to think that the power to sell depends upon the order of court. Without the order, it is true, the administrator can not sell. But the power itself is derived from a higher source, from the legislature itself. By his appointment the administrator is vested with an interest in the personalty, but he has no concern with the realty. At common law an administrator has no right to interfere with the latter. The statute, however, authorizes him to do it under certain circumstances. But it does not leave it in his discretion to determine whether those circumstances do or do not exist. This is to be determined by the probate court upon an examination of the facts. And it is only with the approbation of that court that this power intrusted to him, not by the order of the court, but by the law under which he acts, can be exercised. It can not but be noticed with how much care the legislature have, in all this business, guarded the estate of the intestate. They authorize the administrator to sell, but do not leave it to his discretion when a sale should take place. It can only be done when a certain state of facts exist, and when such is the case it may be done, provided the court advise or direct. In this view of the case I can look upon the order of sale as nothing more than record evidence of the existence of the necessary state of facts to justify such a proceeding, and the assent on the part of the court that the administrator should exercise a power previously vested in him. It calls that power which was before dormant into life and activity. It follows, then, that a repeal of the law is a revocation of the power. And after its revocation a sale made would be void, although during the existence of the statute an order for such sale had been made. In fact, the right to sell depends both upon the existence of the law and of the order, and when either ceases to be in force the right is gone. A repeal ofthe law would not have an effect to rescind equivalent to the effect which the reversal of a judgment would have upon that judgment. And as after such reversal a sale made would convey nothing, so after the repeal of

the law would a sale made be void. While both *the law [504 and the order are in force a good title can be made, but not after one is repealed or the other rescinded.

It remains to be considered whether such effect can be given to the saving clause of the general repealing law of February 22, 1805, as so far to continue the order of 1804 as to sustain the sale under which the defendant claims.

Section 1 of this act provides "that all the laws adopted or passed by the governor and judges prior to the 1st day of September, in the year of our Lord 1799, and now in force in this state, be and the same are hereby repealed." Section 2: "That all laws and resolutions passed by the territorial legislature prior to April 1, 1802, be and the same are hereby repealed, except," etc. "*Provided, nevertheless,* that nothing in this act contained shall be so construed as to affect, in any manner, any *suit or prosecution* now depending and undetermined, but the same shall be carried on to *final judgment and execution*, agreeably to the provisions of any of the said laws under which the suit or prosecution may have been commenced and the practice of the courts."

The determination of this case, so far as the present question is concerned, depends upon the meaning which shall be attached to the phrases, "*suit or prosecution.*"

It is insisted by counsel that the provision before recited should be attached and made applicable to all the acts by which territorial laws were repealed during that session, whether repealed by their title or by this general repealing law. And considering that under the law of 1795 no other proceeding could be had in court, except to procure an order for the sale of land, they urge that such application must be considered in the nature of a *suit* and the order of a *judgment* within this saving clause.

To a certain extent this position may be correct. I incline to the opinion that it was the intention of the legislature that the effects of this provision should apply to the repeal of all those laws when it was necessary for the furtherance of justice, or rather, where laws were repealed under which it might be supposed that a *suit or prosecution* could be pending; and that whether the law was repealed by its title or by *the general law. [505 To consider it as applicable to the repeal of the statutes would be useless. But it does not follow, because such was the intention, that a new meaning shall be given to words, or that they shall be

construed to mean anything different from their ordinary signification. Unless there was a necessity to save a *suit or prosecution*, this saving clause could not be considered as attaching to the repeal of the law of 1795. From the position of the defendant's counsel, then, no inference can be made with respect to the meaning of the phrases "*suit and prosecution.*" At least no inference which can go to change their ordinary import.

I am led to the conclusion that it was the intention to apply this saving clause to the laws generally, by an examination of the session of 1804–5, and from the peculiar phraseology of this repealing law.

It will be found that the several statutes passed that session took effect at a subsequent period. Most of them in June. Some few of them earlier, and one, at least, as late as August. During the session there was a general revision, and, as a general rule, when the legislature acted upon any subject, they repealed by their title such as were upon the same subject, and also all others coming within the purview of the statute which they were then enacting. It is said by the defendant's counsel, that every territorial law then in force was repealed by its title, with the exception of the law of 1795, "for the settlement of intestate estates." That this law was as effectually repealed, as if it had been named by its title, by the act of February 21, 1805 (3 Ohio L. 188), "defining the duties of administrators on wills and intestates' estates," etc., I can have no doubt. Although this course was pursued, there was not attached to each clause a proviso saving *suits* and *prosecutions*. This was the case in but very few instances.

Now let us look at the language of the repealing law. This act, like most of the others, was to take effect on the first day of June. By its terms the legislature do not profess to repeal laws, for the repeal of which provision had not been before made. Their language is, "all the laws adopted," etc., "and *now in force* in this state be and the same are hereby repealed." What laws were then
506] in force? *As well those for the repeal of which, provision had previously been made during the same session, as any others which have been overlooked. The binding force and efficacy of all these it was enacted should cease on the first day of June then next. But all "*suits or prosecutions*" under such laws, then pending, should be prosecuted to final "*judgment and execution*," in the same manner as if the laws had not been repealed. This ap-

pears to me to have been the intention of the legislature, and, by giving this construction to their legislation, it will be found that there is less ground for complaint respecting it than has heretofore been thought.

What laws were then in force, under which it might be reasonable to conclude *suits or prosecutions*, giving to these words their natural and obvious meaning, would be depending on the first day of June? The first law in the statute book (vol. 3, p. 1), is "an act respecting crimes and punishments." This law repeals an act with the same title, published at Marietta, September 6, 1788, and an act supplementary thereto, passed at Cincinnati, June 22, 1791. It might be possible that on the first day of June there would be prosecutions depending under these laws, but still no provision is made in this act that they shall be carried on to final judgment and execution. If we consider the saving clause of the general repealing law as applicable to this statute, these prosecutions would be continued, otherwise they must cease and be determined. The act above referred to did not take effect until the 1st of August; the previous statutes upon the subject were, in virtue of the statute of the 22d of February, repealed on the 1st of June, and the state was left without any law for the punishment of crimes for the space of two months, to wit, from June 1 to August 1, 1805. Those who were then acquainted with the state will recollect well the circumstances, and that it was in consequence of the construction given by the courts of that day to this general repealing law. That construction was, that this law repealed the previous territorial statutes upon the subject of the punishment of crimes, on the 1st of June, although that repeal was provided for expressly in another statute, which did not take effect until the 1st of August.

*These were not the only statutes which were repealed by [507 their titles during the session of 1804–5, and under which *suits or prosecutions*, as generally understood, might have been depending, and which could not be prosecuted to final *judgment and execution* but for this general saving clause. I refer to the following, "an act for the assignment of bail bonds," of January 22, 1802; an "act regulating grist mills and millers," passed December 2, 1799, an "act regulating divorce," passed July 15, 1795. It is needless to name more.

Counsel for the defendant seem extremely anxious to attach

this saving clause to the repeal of the law of 1795. So far as it can be done, and still give to language its ordinary sense and meaning, I am willing to do it. But I have shown that there were many other pre-existing territorial statutes, which were repealed and by their title too, under which *suits* and *prosecutions* might have been pending, and which must have been discontinued but for this proviso, and even under the law of 1795, bonds were required to be taken of the administrator. These bonds might have been in suit, and under this proviso such suit might be prosecuted to final judgment. It is not to be supposed that the legislature had in view the law of 1795 any more than any other law. They were framing a system. And if in some respects it was defective, there is nothing extraordinary in the circumstance. It would be a dangerous course to pursue, in giving a construction to their acts, to go upon the hypothesis that this case now before the court was intended to be provided for especially; or to suppose that construction to be controlled in any measure by its peculiar circumstances. The proper inquiry is, what is the law? When that is ascertained apply it to the case before the court. It is a dangerous course, first to form an opinion upon a case, and then strive to give a construction which will sustain that opinion. There is much plausibility and ingenuity in the argument of counsel upon this point, but I must think it is somewhat deceptive.

In order to show that this order is embraced within the phrases "*suit and prosecution*," counsel have gone into a critical exami-
508] nation of the meaning of the word "*suit*." But *the proper manner of collecting the meaning in any particular case is to look at the connection in which it is used. As to the general signification in the common acceptation of the term, it has reference to those proceedings by which an individual attempts, in a judicial court, to obtain redress for a civil injury. It applies to civil, as *prosecutions* do to criminal cases. The final end of such *suit* or *prosecution* is a judgment which may be enforced by execution. This being the common acceptation of the term, is there anything in the act of February 22, 1805, which should induce us to attach to it a different signification. The language is, "nothing in this act contained shall be so construed as to affect, in any manner, any *suit or prosecution* now depending and undetermined, but the same shall be carried on to final *judgment and execution*, agreeably

to the provisions of any of the said laws," etc. It was a "*suit or prosecution*," then, which could be carried into "*judgment*," and such a judgment as could be enforced by "*execution*" that the legislature had in view. The language is too clear to admit of a doubt. And it can not be successfully contended that the order of May, 1804, was of that description. If not, it is not within this saving clause.

Upon the whole, a majority of the court are of opinion that the evidence was properly rejected. The motion for a new trial will, therefore, be overruled.

Judge COLLET dissented.

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*HINTON, ADMINISTRATOR OF HAGGARD, *v.* MCNEIL AND [509 OTHERS.

Judgment in ejectment until reversed for error, or made void by adverse recovery in a subsequent suit, of the same obligation as other judgments.

Habere facias poss. issued upon judgment in ejectment, and plaintiff put in possession, if again ousted, he can not have a new suit, but must resort to an original remedy.

Though verdict may be technically against law, yet if substantial justice is done, a new trial should be refused.

THIS was an action of trespass tried on the last circuit, in Ross county. A verdict was found for the plaintiff, against McNeil, for twenty dollars; the other defendants were found not guilty. A motion was made by McNeil for a new trial, which was reserved.

The action was commenced by Haggard; on his death it was revived by his administrator. It was for turning Haggard out of possession of a farm and taking possession of it by the defendants, and converting the crops growing on the farm to their own use. It was proved on the trial that the premises are in Ross county, in the Virginia military reservation; that one Stinson claimed them, and settled upon them with his family within a few years after the first settlement along the Scioto, in that county; that he died in possession; that his widow and children, or some of them, continued in possession until the defendant, McNeil, got possession after January, 1823. That in 1818, Thomas S. Hinde obtained a patent for a tract of land which includes the premises; that he

afterward commenced an ejectment in the United States Circuit Court for the Ohio district, and had his declaration served on the tenant of Hinton and wife (the wife of Hinton is one of the heirs of Stinson); that one Mallow was made defendant to the ejectment for himself and the other tenants. In 1821, a judgment was rendered by the circuit court in favor of Hinde, after which Mallow filed a bill in chancery against Hinde, praying an injunction, which was allowed. Hinton and his wife and others were by consent made parties to the bill as complainants, and agreed that if the injunction was dissolved, the *hab. fac. poss.* on the judgment, might issue against them. The injunction was dissolved, and the bill dismissed without prejudice, in January, 1827. In January, 1823, Hinde, by deed of bargain and sale, conveyed to McNeil in fee the premises on which the trespass is charged to have been committed. Some time after, McNeil prevailed on the tenant of Hinton and wife to go out and let him into possession of the premises; after which Hinton and wife brought an action of ejectment against
510] McNeil to recover back the premises, and in *the Supreme Court for the county of Ross, in the fall of 1828, obtained a judgment in that action. A *hab. fac. poss.* issued on this judgment, by virtue of which the sheriff of Ross county, in the spring of 1829, put McNeil out, and Hinton and wife into possession. Hinton soon after leased the premises to Haggard, the intestate, for the year 1829, for which Haggard was to pay to Hinton one-third of the crop raised on the premises, and put Haggard into possession. In August, 1829, McNeil caused a *hab. fac. poss.* to issue on the judgment of the circuit court, which was soon after executed by a deputy marshal of the district, by putting Haggard out and McNeil into possession of the premises. Haggard had on the premises, at the time, a field of upward of thirty acres of corn, which would yield about forty bushels to the acre, two-thirds of which McNeil either delivered to Haggard or suffered him to take off, for which Haggard made him a receipt in these words:

"Received of John McNeil, sen., my two-thirds of all, according to my contract with Hinton; therefore, this is my receipt in full against all claims or demands against said John McNeil, sen., up to this January 8, 1830.

(Signed,) "DAVID his + mark. HAGGARD."

"Witness: ROBERT C. GALBRAITH."

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The defendant, McNeil, moves for a new trial on three grounds:

1. By the patent to Hinde, and the deed from Hinde to McNeil, the title to the premises was shown to be in McNeil.

2. The judgment of Hinde in the circuit court, and the *hab. fac. poss.* were a complete defense to McNeil.

3. The receipt of Haggard showed an accord and full satisfaction for the trespass.

BRUSH, for plaintiff.

LEONARD, for defendant.

COLLET, J., delivered the opinion of the court:

It is a general rule that the judgment of a court, having jurisdiction *of the subject matter and of the parties, is, as a [511 plea, a bar, and as evidence, conclusive between the same parties or privies in any action afterward prosecuted for the same matter by either against the other. So that no matter once litigated and determined, by competent authority, can, in general, again be litigated between the same parties or their privies. To this rule, in our law, we remember but one exception, which is, that a judgment, in an action of ejectment, does not prevent the parties from retrying the same matter in another action of ejectment. Judgments are, many of them, liable to be reversed for error; and judgments in ejectment as liable as others. By reversal a judgment is made void, and the matters, litigated in the case reversed, again becomes open for litigation between the same parties. A judgment in ejectment is also liable to be made void, by the party, against whom the judgment is rendered, prosecuting another ejectment against him who obtained it, and recovering against him. This second judgment makes void the first. But, until a judgment in ejectment is made void by one of these methods, it is as decisive and conclusive between the parties and their privies as to the right of possession of the premises for the time laid in the declaration, as a judgment in any other action is as to the matter litigated in such other action. 1 Stark. Ev. 191, 192, 208; 2 Stark. Ev. 545, 546; 13 Johns. 234; 4 Bin. 359.

The recovery of Hinton and wife, in the ejectment against McNeil, was decisive of their right of possession. McNeil had not recovered the premises in another ejectment, nor was the judgment of Hinton

and wife reversed; he could not, therefore, rely upon his title. It is a general rule, that in trespass, the defendant can defend himself by showing title to the premises in himself; but if that title has before been litigated between the same parties, and adjudicated by a court having jurisdiction, it can not again be litigated between them while that judgment is in force. In debt, the defendant may prove a counter debt as offset, or he may prove payment; but if the matter produced as offset or payment has before been litigated between the parties, and determined on, and the judgment unreversed, it will be rejected.

512] *As to the second ground, when a person claims the right to possess a tract of land which is in possession of another, the law gives such person the action of ejectment, in which his right is tried; if he shows that he has the right of possession, judgment is rendered for him; he then has a right to have an *habere facias poss.* commanding the marshal or sheriff, the executive officer of the court, to remove the defendant from the premises recovered, and put the plaintiff in; when in, he has gained the object of his suit, and government, or the law, will, in that suit, do no more for him. If he is afterward disturbed he must resort to another action. He can not have another execution. 2 Wheat. Selw. 565. If, after the judgment, the defendant leaves the premises, or the lessor can take possession of them peaceably, he may do so without execution, and he will be protected by his judgment, as he would have been had he been put in on execution by the proper officer. He has as fully got the object of his suit. 13 Johns. 234. The execution and the officer were unnecessary, as there was no objection or resistance to his taking possession. When he has obtained possession, he can not afterward have an execution. Adams on Eject. by Tillinghast, 312. When the lessor is in without execution, as he has precisely the same rights, he is protected by his judgment to the same extent, why should not the effect be the same? Why should he after have an execution? The defendant in either case has the same right to commence an action of ejectment against the lessor, or him whom he puts into possession, and a recovery in the second action against the lessor would make void, as has been before said, the first judgment. If, where there had been no execution on the first judgment, one could still issue, it would defeat the effect of the second recovery. Hinde, the lessor, after his recovery in the circuit court, conveyed the premises to McNeil in fee. McNeil afterward took pos-

session by virtue of this conveyance, and was thereby clothed with all the right of Hinde by virtue of this recovery. The action of ejectment was afterward commenced against McNeil by Hinton and wife, and a recovery had against him. This judgment, if Hinde had been made a party to it, would have made void the judgment of the circuit court, as to these *premises, or if he had aliened [513 to McNeil, with warranty, and had had notice of the suit, he might have made himself a party, and was bound by the judgment as though he had been a party. 1 Stark. Ev. 195; 4 Bin. 359. If the conveyance was without warranty, then the judgment against McNeil made Hinde's judgment, as to these premises, void; no one was interested in it, as to these premises, but McNeil. If the judgment was rendered void, no execution could issue on it.

As to the third ground, the crop was made by Haggard. McNeil took possession in August, when nothing more could be done for the crop than to keep up the fences around it, until it hardened and dried, and then to husk and crib it. He let Haggard have two-thirds of corn only, as appears from the receipt. The whole crop amounted to more than twelve hundred bushels; Hinton's one-third part, therefore, was more than four hundred bushels. The verdict is for twenty dollars, which, for four hundred bushels is five cents per bushel. This was justly due to Haggard, and on his receipt of it due by him to Hinton, his lessor. It appears to me that Hinton, the landlord, might use the name of Haggard, his tenant, to sustain, his action. I see no other plain remedy for him; and if so, Haggard could not defeat it, even by a release. Payne v. Rogers, Doug. 406.

Upon the whole, it appears to us that no injustice has been done by the verdict; when this is the case, the court will not grant a new trial. A new trial is only granted when injustice has been done by the verdict, and there is a probability that justice will be done on retrial. 2 Burr. 936.

The motion is overruled.

514] *DUNCAN MCARTHUR v. BENJAMIN W. LADD.

When suit is brought against one of several joint contractors, as upon a contract made singly, taking no notice of the other parties, *exception* can not be taken by demurrer, but by plea in abatement.

An indorsement upon an article of agreement enlarging its terms, made and signed by the parties, is to be taken as part of the agreement and must be declared upon as such.

A contract between the owner of land warrants and a locator, to locate the warrants for a certain portion of the land, each party to contribute a share of the expenses, does not create a partnership between the owner and locator.

THIS cause, on the last circuit, was reserved by the court in Jefferson county for decision here. It was an action of debt. The declaration contained five counts; to it the defendant filed a general demurrer, and the plaintiff joined in demurrer. On these pleadings it came on to be decided.

The article of agreement on which the action is founded, is made a part of the record, and is as follows: "Memorandum of an agreement made and entered into, October 31, 1810, between Duncan McArthur, of Ross county, Ohio, of the one part, and Benjamin W. Ladd, acting for himself and partner, Joseph Ladd, and as agent for Thomas Norvell, of the State of Virginia, of the other part, witnesseth, that the before-named Duncan McArthur, now receives from the said Ladds and Norvell, Virginia continental military warrants and assignments of warrants, to the quantity of ten thousand acres, which he, the said McArthur, is to locate and survey immediately for the said Joseph and Benjamin W. Ladd and Thomas Norvell, upon the following terms and conditions, to wit: The entries and surveys are all to be made on the west side of the line run by Ludlow, from the head spring of the Little Miami river, to intersect Ludlow's north boundary line, which line, when produced, was intended to strike the source of Scioto river, and to be the dividing line between Virginia military and Congress lands. All office fees, chain carriers, etc., are to be paid by Joseph and Benjamin W. Ladd and Thomas W. Norvell. Duncan McArthur shall be entitled to one-fifth part of the land so located, having respect in the division to quantity, quality, and

situation; but it is to be understood, that if from any cause whatever, the location made under this contract by the said McArthur for the said Ladds and Norvell should not hold the land, then and in that case the said McArthur shall not have any interest in or part of said warrants, but they shall be exclusively and entirely at the disposal of said Ladds and Norvell: *Provided, nevertheless*, that in case Congress should give other lands or money in lieu of the land which shall be located by the said McArthur, it is to be understood that he, the said *McArthur shall have his [515 one-fifth part of all such lands or money; it is also expressly agreed upon between the parties hereto, that each, in proportion to the interest that he or they may or shall have in the land, shall pay his or their proportionate part of all the expenses which may be incurred in trying the validity of the locations made by virtue of this agreement, whether before any court of law or before Congress, etc. For the faithful performance of all and every part of the foregoing contract, the parties hereto bind themselves, their heirs, executors, etc., each to the other in the sum of fifty thousand dollars. Given under our hands and seals, in the town of Chillicothe, the day and date first above written.

"BENJAMIN W. LADD, [L. S.]

"*For himself and partner, Joseph Ladd, and as agent for Thomas Norvell.*

"DUNCAN MCARTHUR, [L. S.]

"Before *And. Lindsey* and *Peter Spurgh.*

"*Memo.*—Whatever warrants or assignments B. W. Ladd shall send on to Duncan McArthur, in addition to the quantity mentioned within and one thousand acres now handed him, the said McArthur, is to be located on the same terms and conditions expressed within.

(Signed,) "BENJ. W. LADD,
DUNCAN MCARTHUR."

The first count of the declaration states that, "Whereas the said Benjamin W. Ladd heretofore, to wit, etc., etc., by his certain writing obligatory, sealed with his seal, etc., acknowledged himself to be held and firmly bound to the said Duncan, etc., which said writing obligatory was and is subject to a condition in writing, being part and parcel thereof, to the effect following:" then follows a copy of the agreement, except the part containing

the penalty and the conclusion, and adding thus: "And it was also agreed by the parties that," etc.; here follows the memorandum indorsed on the agreement.

It is then averred that Benjamin W. Ladd, in addition to the warrants for ten thousand acres and for one thousand acres, put into McArthur's hands, to be located according to said agreement, warrants for four thousand seven hundred and sixty and two-
516] thirds acres, amounting in all to fifteen thousand *seven hundred and sixty and two-thirds acres; that McArthur immediately made entries in Richard C. Anderson's office on these warrants for all the lands called for by them; the land entered all situate west of Ludlow's line, etc., and that he surveyed them. Here follow copies of the entries and surveys. It is then averred that in making these locations he paid for office fees, chain-carriers, and necessary expenses ten thousand dollars, and that he paid for the use of Benjamin W. Ladd and Ladd and Norvell, in defending said locations before Congress and the judicial tribunals of the United States and the State of Ohio twenty thousand dollars, (sixteen thousand dollars) four-fifths of which Benjamin W. Ladd is made to pay; that McArthur, by the locations, became entitled to one-fifth part, etc., of the land located, but that B. W. Ladd, or Ladd and Norvell, or either of them, would not convey or assign to him, although requested, etc., the one-fifth part of said lands, or pay him any part of the money advanced as above. That the said B. W. Ladd afterward, etc., assigned and transferred the warrants located as aforesaid without and against the consent of McArthur; that the assignees withdrew the entries aforesaid, and thereby made void the locations and surveys made by McArthur, which makes it impossible for McArthur to obtain his one-fifth part of said land, whereby he is injured, etc.; whereby, etc.

The second count is as the first, omitting the averments of money advanced by McArthur.

The third is as the second, except that it avers generally that McArthur located the warrants according to the agreement, but does not set out copies of the entries and surveys.

The fourth is on the agreement rejecting the indorsement as a part, and is in other respects substantially as the third.

The fifth is for the penalty only, without setting out the contract or assigning breaches of it.

COLLIER and COLLIER, for the defendant, cited 9 Johns. 286; 4 Term, 313; 2 Caine C. E. 1; 1 Mont. on Part. 43; Gow Part. 185; 1 Saund. 154, n. 1, 291, notes; 1 Chit. Pl. 29, 32; 2 Taunt. 254; 5 Burr. 2614; 2 East, 313; 1 B. & P. 67; 3 Stark. Ev. 1062; 3 Cowp. 426; *2 B. & A. 746; 4 Ohio, 346; 9 Wheat. [517 587; 1 Chit. Pl. 303; 8 Johns. 253; 2 Johns. Cas. 55; 1 Mont. on Part. 1, 6; 15 Johns. 422.

TAPPAN and VINTON, for plaintiff, cited 2 Wash. 168; 5 Peters, 116, 120–126; 1 Wash. 12; 1 Chit. Pl. 643; 1 Saund. 291. n, 3, 4; 1 Saund. 172 C. n. 4; 2 Anst. 448; 3 Anst. 811; Com. Dig.. Attorney, C. 5; 5 Mass. 30; 5 Bin. 615; 7 Term, 205; 13 Johns. 307; 1 Hen. & Mun. 423; Co. Rep., 5 part, 119; 2 Bl. 948; Conn. 832; 1 Wash. 19; 5 Burr. 2611; 29 Ohio L. 68, sec. 50; 1 Chit. Pl. 27, 28; 1 Camp. 329; 4 Esp. 182; 4 Esp. 145; 10 Johns. 226.

COLLET, J., delivered the opinion of the court:

It is contended that this action should have been brought against Joseph Ladd and Thomas Norvell, as well as against Benjamin W. Ladd.

Joint contractors, if living, must all be sued together, or those sued may plead in abatement that another (naming him) is a joint contractor, and that he is living; or, if these appear by the declaration, advantage may be taken of them by demurrer. But neither of these facts appear by this declaration. It is averred to be the writing obligatory of Benjamin, that it is sealed with his seal, not that it is the writing obligatory of Joseph Ladd and Thomas Norvell, or either of them, or that it has either of their seals. It is not averred that Benjamin W. Ladd sealed for them, or that he had authority to do so. The statement in the article as copied into the declaration, is not an averment of McArthur; it shows that Benjamin W. Ladd represented himself as agent for Norvell and as a partner of Joseph, and no more. As a partner he could not execute a deed which would be binding on Joseph. Wat. Part. 218. If Joseph and Norvell were present when Benjamin made the deed, and authorized him to do so, for them, they are bound; but this is not averred, nor is it probable. Benjamin W. Ladd professed to be authorized to execute the deed for Joseph and Norvell; he should aver and prove it, and that they were one or both living when this action commenced, before McArthur can

518] be put *out of court on these grounds. If judgment was rendered against McArthur, he would have to pay the costs of this action. If, when he sued the others, he could not prove that Benjamin was, by deed, authorized to execute this deed for them, or that they were present when it was executed and authorized it, or if it appeared that they had since died, he would have the costs of that action also to pay, and again to commence his action against Benjamin W. Ladd. B. W. Ladd is, undoubtedly, liable to McArthur on this contract, if it has been violated by him, and before McArthur can be compelled to recommence his action against him, joining others, it must appear by the admission of McArthur on record, or from proof by B. W. Ladd, that the others are really parties to the deed, and that they are living. 1 Saund. 291, a. b., n. 1, 2, 3, 4; 13 Johns. 310; Rees v. Abbott, Cowp. 832. This objection, it is very clear, can not be sustained by the court.

It is contended that the indorsement on the article of agreement is no part of it, but an independent agreement not under seal, and that the first, second, and third counts of the declaration, which set out the indorsement as a part of the article, are therefore bad.

An interlineation or erasure materially varying a deed, made before its execution, or after, with the consent of the parties, does not make it void, but the instrument as altered, is the deed of the parties. The interlineation or erasure is presumed to be fair. Speake v. United States, 2 Pet. 249. It is not easy to perceive why an indorsement, or a note at the foot, or on the margin of a deed, when there was not room to write it distinctly between the lines in the proper place, should not have the same effect. On policies of insurance, it is common, at the time of making the policy, to indorse memorandums varying in terms; these are taken as a part of the policy. 2 Wheat. Selw. 703; 3 Chit. Pl. The case of the United States v. Tingey, 5 Pet., was an action of debt on a bond with a condition, and a memorandum indorsed varying the condition. The declaration contained two counts. One was on the penal part only of the bond, the other set out the condition with the indorsement. The defendant filed several pleas, to which the plaintiff demurred. The court decided for the de-
519] fendant on one of his pleas; *no objection appears to have been taken to the declaration, because of the indorsement. The court, in their opinion, state the nature of the action and the sub-

stance of each count, and that the condition and indorsement were contained in one, but make no remark to it. The case of Gordon *v.* Frazier and another, 2 Wash. 130, was debt on a penal bill for the payment of tobacco; there was a memorandum indorsed on the back of the bill, varying its terms, signed by the parties; a judgment was entered on the bill without regarding the indorsement, for which a writ of error was brought, and the judgment for that cause reversed, and the court of error entered judgment on the bill as varied by the indorsement. The indorsement shows that it was made by the consent of Benjamin and McArthur, it is signed by them; that it was intended by them to form a part of the article is to be inferred. The warrants to be furnished are to be in *addition* to the ten thousand acres provided for in the body of the article; to be located on the same terms and conditions. It is a "memo.;" it is without date, probably, therefore, done before the final separation of McArthur and B. W. Ladd. Benjamin and McArthur appear to have transacted the whole business. The article is formally signed and dated; the memorandum is informal, but signed by the same persons. Memorandums on the margins of deeds and indorsements are sometimes not even signed. We are informed that the memorandum referred to was not signed. Whether this memorannum forms a part of this article is a question for a jury to determine under the charge of the court on an issue of *non est factum*, as it would be if there was an interlineation varying the article as first drawn. 2 Pet. Cond. 249.

If the memorandum is not considered a part of the article or deed, it is a simple contract between the same parties (as they now appear), of which the covenants in the article form a part. To recover, on this contract, for anything more than the cash advanced by McArthur, by the technical rules of law, an action of *assumpsit* must be brought, in which the same evidence given in the action on the article must be again collected and given, and a second trial had on the same facts, when justice could not probably be so well administered between the parties as by a tribunal having the *whole case at the same time before it. If this [520 question was doubtful the court would decide that the memorandum should be taken as a part of the article. The defendant can take nothing by this contract.

It is again objected that by this article the parties are partners

and that this action can not therefore be sustained. Clearly, in our opinion, between themselves the parties are partners. The warrants belonged to the Ladds and Norvell, to be surveyed and located for them, and unless they assigned them before location the location must be in their names; to them the patent must issue. McArthur, a surveyor and locator in this district, agreed to do this for them. When it was done he would have no title; a right only (having performed his covenant) to demand of them a conveyance of one-fifth of the land, and if they refused, a right to file a bill against them for a specific performance, or to bring an action at law. The lands in the Virginia military district have for the most part been thus located. The owner of a warrant employed one of the deputy surveyors of the district to enter and survey the land on his warrant, for which he agreed to convey to the surveyor a portion of the land located. Now, did every revolutionary soldier or officer in the Virginia line or continental establishment, who made such a contract with one of these deputy surveyors, become a partner of his, so that if the surveyor did not perform his contract he could not sue him in a court of law; or if the soldier or officer, after he received a title, refused to convey, or put it out of his power to do so by a sale or by a withdrawal of his entry, could not the surveyor sue him for this breach of contract in a court of law?

Ladd and McArthur intended to cover by these locations lands which had been sold by the United States and made valuable by the improvements of the purchasers, although there was an abundance of good land unappropriated within the reserve to satisfy these warrants. Between Ladd and McArthur this can make no difference. They foresaw lawsuits and a contest with Congress, and provided that each should bear his proportion of the costs and have his proportion of the recovery. This does not vary the nature of the contract; their common interest in equity, in the subject in controvery, would have subjected them to this. 3 Kent 521] *Com. 2, 3. When partners covenant to do a particular thing other than to pay the proportion of the profits, an action lies for not doing it; for, as to such covenant, it is not necessary to settle the whole accounts of the partnership to ascertain the damages: as, if a partner covenants to advance stock, or not to withdraw, etc. Gow on Part. 85, 86. Here the defendant covenanted that McArthur should have one-fifth of the *land*, and he has,

by withdrawing the entry or causing it to be withdrawn, put it out of his power to fulfill this part of his contract. He covenanted to pay four-fifths of the costs of the litigation, all the cost of chain-carriers, etc.; this he has not done; so, that whether this is or is not a partnership this action lies.

The fourth count, which describes the contract without embracing the memorandum, is, from the view we take of the contract, bad for this variance. On a general demurrer, if one count only is good the demurrer must be overruled. It is so of breaches assigned; if some are good and others not, on a general demurrer the declaration is good. 1 Saund. 286, n. 9; 1 Chit. Pl. 327, n. Here, in each of the four first counts it is averred that the defendant had assigned the warrants without the consent of McArthur; that the entries or locations had, in consequence, been withdrawn. This put it out of the power of McArthur to obtain any part of the land, or compensation for it of others. After these averments are admitted by the demurrer, can the defendant say that a useless demand to convey was not made of him, or that the demand was not of the proper person, or that it was not averred that the Ladds and Norvell had the legal title? He who puts it out of his power to perform a covenant by that act violates it. The parties, by the article, agreed "that if from *any cause whatever*," the locations should not hold the lands, the Ladds and Norvell should have back their warrants. The title might have failed by McArthur's making the locations unskillfully, or by the lands not being in the Virginia military reservation. It is to causes like these that the parties must have referred. It can not mean that Ladd might, at any time, rightfully destroy the location to get back his warrants. Ladd covenants that McArthur, for locating and surveying these lands, and for being at *one-fifth of the expense [522 attending litigations growing out of the locations, should have one-fifth of the lands obtained by the locations, or of land and money recovered by the litigations. This covenant is an engagement of Ladd to do nothing to defeat McArthur's claim. The article goes further. Ladd agrees to advance a proportion of the cost of the litigation necessary to obtain the land. "Judges should be *astute* in furtherance of right and the means of recovering it. And therefore one is ashamed to see either hitch or hang upon pins or particles, contrary to the true manifest meaning of

the contract," said Lord Mansfield, in Rees v. Abbott, referred to above. It is not necessary for the court to go further; the demurrer is general, and the three first counts, in our opinion, are good. The demurrer must, therefore, be overruled.

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RICHARD DOUGLASS v. JOHN McCOY, THE WIDOW AND HEIRS OF THOMAS WORTHINGTON, THE WIDOW AND HEIRS OF SAMUEL FINDLAY, AND THE HEIRS OF SAMUEL MASSIE.

A judgment, by confession, without pleadings, and found only on the journal of the court, though erroneous, is not void.

Defect in description of a levy may be supplied by parol.

Where several executions are levied upon the same lands, a sale upon one subjects the price paid, to distribution according to law, if application be made in season. A sale upon each is unnecessary.

Holder of lands, in the Virginia military district, by entry and survey only, sells and conveys. After his death, patent issues to his heirs, title inures to purchaser, who, or his assigns, is so invested with the fee that it may be sold on execution.

An original liability, as security, can not be so connected with a subsequent conveyance to secure, as to overreach an intervening judgment.

Vendee from judgment debtor, having relinquishment of dower, can not set up that dower, as a separate independent estate, against preferable purchase under judgment.

THIS was a suit in chancery, reserved from the county of Ross. The facts are stated in the opinion of the court.

DOUGLASS, for plaintiff.

SCOTT & MURPHY, for defendants.

Judge LANE delivered the opinion of the court:

The plaintiff, by his bill, avers that he holds the possession of, and the legal title to, outlots Nos. 1 and 5, in Chillicothe, and asks of the court to exercise the authority conferred by statute, to quiet his title against the claims set up by the defendants.

523] *The heirs of Massie have not answered. The heirs of

Worthington set up a title, on a sale by execution, made June 4, 1825. This judgment is subsequent to the judgment under which the lands were sold to the plaintiff, and this sale is subsequent to his purchase; if, therefore, Douglass shall establish his legal title it is superior to this claim, consequently it need not be further noticed.

McCoy is the substantial defendant, and the merits of the case are comprised in adjudging if he or Douglass possess the preferable right.

The title of both parties arises from Findlay. In 1797 the land was entered and surveyed by Massie, who sold lot No. 1 to McCoy in September, 1797. On June 24, 1807, McCoy conveyed it to Lamb, who, on July 13, 1812, conveyed it to Findlay. The other lot, No. 5, on June 20, 1798, was conveyed by Massie to Ferguson, who conveyed it to Lamb on February 18, 1800, who conveyed it to Findlay on March 24, 1811. On December 31, 1814, after the death of Massie, a patent for the entry, which embraced these lands, was issued to his heirs.

On August 14, 1819, the mayor and corporation of Chillicothe recovered two judgments against Findlay, the executions of which were levied upon lot one and two-thirds of lot five. Sale was made to the judgment creditors under this levy in 1822, and in 1829 their interests were conveyed to the plaintiff. The judgments not being fully satisfied by the above sale, an execution was issued for the balance, which was levied on the remainder of lot one, and sold to Douglass. By these sales the plaintiff insists he acquired a title to the lands.

McCoy's title arises in the following manner: On June 27, 1821, Findlay agreed to convey the land to him to indemnify him against certain liabilities incurred before 1819. On June 28, 1821, Findlay and wife conveyed to McCoy in execution of the above agreement. McCoy afterward, with the assent of Findlay, procured a deed from Wallace, a trustee appointed by the legislature, to convey the title of Massie's heirs, arising under the patent, to the purchasers of lands from their ancestor. The paper title of *McCoy does not rise until after the entry of the judgment [524 upon which Douglass' title depends. To impugn *that* with success it is necessary to show that there was no valid judgment, or that no interests of Findlay's were bound by its lien, or that the pro-

ceedings under the execution were so irregular as to confer no title upon the purchaser.

It is objected that no judgment is shown. There is no transcript of a complete record, no process, no pleadings; but a copy of the court journal is shown, in which, after giving the name of the case, it is stated that the parties appeared and submitted the case to the court, who entered judgment for the plaintiff, etc. Undoubtedly the judgment is erroneous, and would be reversed upon error, but it is not void. A judgment confessed in open court, without process of pleading, is valid. 3 Ohio, 273. The judgment of a court of competent jurisdiction over the parties and subject, however irregular and summary, can not be treated as a nullity. 3 Ohio, 305; 4 Ohio, 327. The validity of such a proceeding is only open to inquiry upon error or *certiorari*.

The defects in the levies give rise to the next class of objections.

The levy returned upon the first execution is upon "out-lot No. 5, and two-thirds of lot No. 1," and it is insisted that it is void for uncertainty. No doubt such return is defective; it was so holden in Lessee of Mathews *v.* Thomson et al., 3 Ohio, 272, but it was there adjudged that the defect might be supplied by parol. This proof is before us; the order of confirmation identifies the land as "part of the lot which lies south of the garden," which description is carried into the deed. Perhaps this would lead the court, in absence of contradictory proof, to presume, if necessary, that the part conveyed was the part appraised, and was duly described in the advertisement. But the testimony of Clifford, the sheriff, satisfactorily shows that the appraisal was properly made upon the part conveyed, and it is probable that a specific return was made upon another paper, one attached to the writ, but since lost.

The levy of the second execution is upon "the north side of lot No. 1, in the occupancy of Findlay." The appraisement and 525] sale is of "nine poles from the north *end* of lot *No. 1, fronting on Paint street, and running the whole width of said lot, on Fifth street, being the yard, garden, and improvement inclosed." We find no ground of uncertainty here.

The sale, the one in which Douglass was the purchaser, was made to satisfy, not only the balance of the judgments, in which the mayor and commonalty of the town of Chilicothe had recovered against Findlay, but likewise the amount due upon two other

judgments. Evans recovered a judgment against Findlay, in Ross common pleas, on November 8, 1820. *Fi. fa.* was issued upon this, July 21, 1824. The Bank of Chilicothe recovered a judgment against Findlay, on August 29, 1820, upon which a *fi. fa.* was issued, September 18, 1824. Both executions were levied upon the land, while held by the execution of the judgment of the mayor, etc., of town of Chillicothe. The objection now taken is, that although the avails of the sale were appropriated upon three judgments, yet the return shows no levy, appraisement, or sale, except upon the latter. But it will be observed that the land stood levied upon, by the former executions upon the judgment, recovered by the mayor, etc., of Chillicothe, when the *vendi.* was issued, by which it was sold. The date of this *vendi.* was July 26, 1824; the appraisement was made under it. The *fi. fa.* upon the Evans judgment bears date on the 21st of July, and was delivered to the sheriff on the 27th July. The *fi. fa.* upon the bank judgment was issued, and delivered to the sheriff on the 18th of September; so that on the 20th of September, the day of sale, he had execution upon these three judgments, all liens upon the land. The advertisement was regularly made, and no act was omitted to bring the property to a fair sale. Under these circumstances, separate proceedings, under each execution, were unnecessary, and independent appraisals might tend to perplex the title. The duty of the sheriff was well executed by an appraisal and sale under one, and an appropriation of the surplus to the others.

But the strongest reliance of the defendants' counsel is upon the position that Findlay never had any interest in the land, except in equity, which could not be reached by *execution. [526 It is necessary that this objection be removed before we can administer to the plaintiff the relief he asks. The title of Findlay was derived from Massie, while he held the land by entry and survey only; no patent was issued, except to his heirs, after his death. It is assumed that the heirs, acquiring a title under these circumstances, took by purchase, not by descent; that the covenant of warranty by the ancestor works no estoppel; and therefore, that the title acquired by Massie's heirs, does not inure to Massie's purchasers. This point has been heretofore adjudged in this court, in a case arising under the same patent, Bond's Lessee v. Swearengen, 1 Ohio, 395 and the opinion there expressed by

the court is, "that Massie, after his entry and survey, might dispose of the lands; and when a patent was afterward issued, either to himself or his heirs, by which the legal title became perfect, it inured to the benefit of his grantees, so as to make their title good."

This decision is the subject of severe criticism by the counsel for the defendant, and the most strenuous efforts are made to induce the court to overrule it. But no case ever decided here has been the subject of more anxious and careful investigation. The judges who decided it, with the opportunities they had, and the care they bestowed, were little liable to be misled. The present members of the court, after examining the arguments of counsel, and the reasoning in the report, fully acquiesce in the opinion of the court, as there expressed, and regard the point decided as a settled rule of property in Ohio.

The counsel for the defendant set up an equity in McCoy earlier than any right accruing to the plaintiff. It does not arise from the deed from Findlay to McCoy, for that bears date in June, 1821, and is overreached by the judgment; nor from the agreement, since it was made but the day before; but he relies upon the fact, that McCoy incurred liabilities for Findlay, prior to 1821, which Findlay *ought* to indemnify. Undoubtedly this imposes upon Findlay the moral obligation to save him harmless, but no such specific, perfect right as a court of equity can enforce.

The claim to the surplus money can not be settled in this suit. 527] If any remain in the hands of the sheriff, let it be *claimed from him. The judgments are satisfied by the sale, and it is a matter of no importance, to McCoy or Findlay, if the purchaser has paid or not.

Another point made by the defendant is, that by Findlay and wife joining in the deed to McCoy, her dower at least passed by the deed; and as Findlay is now dead, McCoy may set it up as a bar to the plaintiff in this suit. But we consider it no obstacle to a decree against McCoy. Although the deed from Findlay and wife to McCoy extinguished the right of dower in the land conveyed, it was not intended to pass, nor did it pass the right of dower as a separate substantive estate, if no lands were conveyed by the deed, for the law will not permit the alienation of such possible contingent interests. 4 Kent's Com. 254; 9 Mass. 143. Neither can it be aliened before assignment, so as to enable the

grantee to maintain a suit in her own name, for it lies in action only. 17 Johns. 167.

The facts, in the opinion of the court, show the plaintiff holds the legal title and the possession of the land, and is, therefore, entitled to the decree. The statute in such case imperatively gives costs. 29 Stat. 83; Id. 14.

In this determination we place no weight upon the number of trials, in which the parties to this suit have litigated their right to the land. In the English chancery, a bill of peace is not determined, unless the rights of the parties are satisfactorily established at law, by more trials than one. Ours gives the remedy in all cases where the title and possession meet in the same person.

Decree against all the defendants, except Mrs. Findlay.

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*Pike Township v. Union Township. [528

Where a new county line divides a township, though the residence of a pauper fall within the new county, the old township remains chargeable with his support.

Decided by Judges Collet and Wright, in Madison, 1831.

This was an action of debt under the statute, to recover compensation for necessaries furnished a pauper. The father of the pauper had a settlement in Pike township, in Madison county, and died, leaving the son a minor, who afterward became a charge upon the township. The county of Union was afterward established in 1819. The southern line of the county divided Pike township and threw part of its territory into Union county. A dispute arose about this line, which lasted several years. Various lines were run at different times as the true line. By some of these lines, the house at which the pauper was boarded, fell into one county, and by others into the other. The line was finally settled in 1828, and the house at which the pauper was boarded fell into Union county. The township of Union, in the latter county, adjoined the territory cut off from Pike. Under the impression that Union township was liable for the support of the pauper, this suit was brought to recover the expense of keeping him since Union county was established. There was no evidence

that the part of Pike township which fell into Union county was ever attached to the adjoining township of Union, or formed into a new township, though it appeared that the trustees of Union township had exercised jurisdiction over it.

DOUGLASS and KERR, for plaintiff, cited 22 Ohio L. 412; 3 Ohio, 101.

O. PARISH and G. SWAN, for defendant, cited 1 Root, 423; 4 Day, 189; 4 Mass. 278, 452.

Judge WRIGHT delivered the opinion of the court:

By the law of this state, 22 Ohio L. 412, power is given to the board of commissioners in each county, to form political townships of not less than twenty-two square miles (except including 529] an incorporated town), and to alter the boundaries *of townships when necessary; and such townships become thenceforth bodies corporate. No provision is found in the general law, nor in the act establishing Union county, providing for the division of townships cut in two by the lines of a new county, or directing the disposition of the *territory* thus severed, or of the property of such townships, or of the paupers and other charges upon them. Until the general assembly do make other provision, we must decide questions arising out of such difficulties upon common principles.

Where a township is divided by competent authority, and a portion of the territory formed into a new township, unless provision is made in the act of separation for a division of the property and paupers, both remain with the old township, or that part which retains the name or corporate franchises. The law is so laid down in Massachusetts and Connecticut upon good reason. 4 Mass. 278, 452; 4 Day, 189. The local residence of the pauper at the time of separation makes no difference. He belongs to the *township*, and has no locality peculiar to himself within it. In the case on trial, the pauper never had a settlement in Union township, and Pike can have no right of action against it. The pauper had a settlement in Pike at the time a part of its territory was cut off into Union county. But as he was not attached to the territory, he was not transferred with it. He remained a charge on Pike. But if this were less clear, still Pike could not recover against Union without evidence to show that the territory cut off

from Pike has been attached to Union township. That it is included in Union county is not sufficient to incorporate the territory embraced into any township.

By the law (22 Ohio L. 230, 231) paupers in townships where they have not gained a legal settlement, who need assistance, may be supplied by such township at the expense of the township where the pauper was last legally settled, and recovery had of the amount of such assistance and the expense of removal of the township where the pauper was last legally settled. The case on trial is not within this provision. This pauper was not within or supplied by a township where he *had not been* legally settled, but where he *had been* settled. We are not able to find any provision of the *statute or principle of law that will sustain the [530 plaintiff's case.

Verdict and judgment for defendant.

William Rabe v. Thomas Hanna.

Where a husband, brutalized by intemperance, neglects or abuses his wife, her father may receive and protect her and her children, and no action lies for the husband.

Decided by Judges Hitchcock and Wright, in Guernsey, 1832.

Trespass for entering plaintiff's house, and forcibly carrying away his wife and keeping her away, and also for persuading away the plaintiff's children. From the evidence offered by the plaintiff it appears that the plaintiff's wife was the defendant's daughter, and that, owing to the intemperate habits and ill-treatment of her husband, she had left him and returned to her father's house; that to induce her to return, the plaintiff promised reformation, and entered into a written agreement, wherein it was stipulated that she should live with him if he kept sober, but if he got drunk she was to leave him and live with her father. After this agreement she returned and lived with her husband. He soon fell into his bad habits, and she, with her young children, again left him and returned to her father's house. This was done without her father's aid, and when he was away from home. She and her children have resided with her father ever since, and

he has provided them with necessaries free of expense to the plaintiff. The defendant, being about to remove with his family into Pennsylvania, took Mrs. Rabe and her children and some others of his family a day or two in advance of the rest of the family to avoid interruption and disturbance. The wife and children reside with the defendant in Pennsylvania, and have no intercourse with the plaintiff. It did not appear that the defendant had any agency in bringing his daughter and her children from the plaintiff's house, or did anything compel them to stay away from him; but it was in proof that the defendant had repeat-
531] edly endeavored to induce his son-in-law to reform, *and had made him several offers as to business and property if he would reform, but without effect. Upon this state of fact,

HUBBARD, BEEBE and BELL, for defendant, moved for a nonsuit, because the evidence showed there was no trespass committed by the defendant. They cited 9 East, 371; 11 East, 71; 5 Johns. 196.

W. KENNON and S. W. CULBERTSON, contra, contended the gist of the action was the loss of the society of the wife, and the question is, has she been persuaded away, which was for the jury. They cited 1 Chit. Pl. 164; 5 Term, 361; 313 Ch. Com. 137; Clancy on Marital Rights, 428.

WRIGHT, J., delivered the opinion of the court:

If the grounds of the action be, as contended, for enticing away the plaintiff's wife, it is misconceived. It should have been case, not trespass. If the injury complained of be upon the person of the wife, she should be joined with him in the suit. If the wife has, through persuasion or fraud, become the instrument of the defendant, in any direct injury upon the plaintiff's person or his property, trespass may lie, but there is no evidance applicable to such a state of things. The proof is, that the wife voluntarily left her husband because he had brutalized himself. She sought shelter under the roof of her father, and he has received her, and given her the protection and support refused by the husband; a protection dictated alike by the best feelings of the heart, the natural affection, and the common sense of the world. Does such an act make the father a trespasser? We think the law affords no countenance to a position so shocking to humanity and pro-

priety. Does not the law permit a father to receive his own child into the bosom of his family, and to afford her needful shelter, food, and clothing, when she is abused and neglected by her husband? Shall he become a brute, and turn away his daughter, when cruelly driven by her husband from his doors, and left to perish, or become obnoxious to the law as a trespasser upon the property or *conjugal rights of her husband? In our esti- [532 mation no such barbarity is required by the law of any civilized people. The law recognizes no principle so revolting to good feeling and propriety. The case in 5 Johns. 209, is exactly in point, and we cordially concur with Chief Justice Kent, that a "father's house is always open to his children, and whether they be married or unmarried, it is still to them a refuge from evil and a consolation in distress. Natural affection establishes and consecrates this asylum. The father is under even a legal obligation to maintain his children and grandchildren, if he be competent, and they unable to maintain themselves; and, according to Lord Coke, it is 'nature's profession to assist, maintain, and console the child.' I should require, therefore, more proof to sustain the action against a father than against a stranger. It ought to appear that he detains the wife against her will, or that he enticed her from her husband from improper motives. Bad or unworthy motives can not be presumed. They ought to be positively shown or necessarily deduced from the facts or circumstances detailed. This principle appears to me to preserve, in due dependence upon each other, and to maintain in harmony, the equally strong and sacred interest of the parent and the husband."

The proof in this case falls short of what is requisite to sustain the action of trespass. The plaintiff has not made a case for the jury. A nonsuit is ordered.

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*Dixon v. Cassell. [533

Laws of Ohio do not recognize an administrator *de son tort*.

Tried before Judges Lane and Wright, in Jefferson, 1832.

This was a writ of error to the common pleas of Jefferson.

The only question raised is whether a creditor of a deceased person, in Ohio, can sustain a suit against an executor *de son tort.*

SUTHERLAND and LEAVITT, for plaintiff.

J. and D. L. COLLIER, contra.

By the COURT:

By the law of this state administration is granted on intestate estates: 1. To the widow. 2. To the next of kin. 3. To creditors, if they apply. If the estate exceeds one hundred dollars in value, the court of common pleas, on application, may cause the next of kin, if in the county and known, or the person having the custody of a decedent's goods, to appear and show cause why administration should not be granted; and if they fail to appear, or to show good cause, the court is empowered to appoint any person administrator. Creditors of the decedent are entitled to an equal distribution of the assets free of lien; no one can get the preference. Judgments are against assets to be administered, and are only to be levied upon assets. 22 Ohio L. 128; 5 Ohio, 87. This equality would be destroyed, if suits are sustained by any creditor against those having custody of goods of the decedent, as executor *de son tort.* It is unnecessary to sustain such suit, and we are unwilling to afford the opportunity, as we must if we sustain this suit, for one creditor by attending with a person having the custody of a decedent's effects, to appropriate the whole assets to his individual debt, to the exclusion of all other claims. The judgment must be affirmed with costs.

534] *LESSEE OF ALSHIRE *v.* J. R. HULSE.

Proof that posts were set up as corners, between adjoining owners of land, controls the calls for course and distance.

DECIDED by Judges HITCHCOCK and WRIGHT, in Pickaway, 1832.

This was ejectment. The question was one of boundary. The second and third corner, called for in the plaintiff's deed, was a

post. It was in proof that a survey was made before the deed, and the corner posts fixed. The parties had possessed and improved up to a line run from post to post, and the plaintiff had acknowledged that to be his boundary, and the places where the posts stood, which was ascertained, his corners. But finding, after several years, that he had a less quantity of acres than he supposed, and that to run the line the exact course and distance called for, would carry them beyond the place where the posts stood, and give him a number of acres more than he possessed, brought this suit. He now claims to regard *the posts* as immaterial and void calls, and to run his lines by course and distance.

GREEN and OLDS, for plaintiff, cited 3 Pet. 96; 9 Cranch, 169, 370; 2 Bibb, 369; 1 Johns. Ch. 242.

CALDWELL and IRWIN, contra, were stopped.

By the COURT:

In appropriating public domain, in the wilderness, where surveys have been made under legislative acts directing the location "so specially and precisely as that others may be enabled with certainty to locate other warrants on the adjacent *residuum*," 9 Cranch, 168, courts have applied strict rules of construction; have required surveys to conform to the laws, and so to describe the land that every one may know what is appropriated. In such cases as in 3 Peters, 96, and 2 Bibb, 390, calls for a *beech* or *hickory tree*, in forests of like trees, without more particular description to point them out, are held immaterial and void for uncertainty. The rule does not apply with the same strictness to actual surveys and descriptions in an improved and settled country. *There is no pretense of analogy in the description in the [535 plaintiff's deed, and that in Peters. Posts were not common and undistinguishable on this land, as *beech* or *hickory* trees in forests of such timber where there are thousands alike. All lands sold by metes and bounds are supposed to have been surveyed, and the deed is given to convey what has been surveyed, although the lines may not, in fact, have been run out. 9 Cranch, 178. The real question is, where were these corner posts fixed? If the spots are ascertained, the calls of the deed are satisfied; and they will control the course and distance of the line, as much as if the ob-

ject described as a corner were a larger or more showy and costly monument of wood or stone. There may be more difficulty in finding them, but when found they have equal legal efficacy. A *post*, a *stake*, a *stake and stones*, or a *stone*, are common objects called for in the survey of boundary lines in an improved country, between individual holders. Shall we vitiate all such surveys and calls? If the evidence satisfies the jury where the posts were fixed for the corner, and that a line drawn from one to the other bounds the defendant's possession, he is entitled to a verdict. The evidence on that subject does not contradict the deed, but fixes the call of the deed and applies it upon the ground. The objection to its admission is not well taken.

Verdict and judgment for defendant.

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536] *C. ROGERS *v.* WEAVER.

Administrator, supposing an estate solvent, pays creditor beyond his distributive share, upon final settlement may recover back the difference, in an action of money had and received.

An agreement of the parties, after an award made, to waive, is obligatory.

DECIDED by Judges HITCHCOCK and WRIGHT, in Franklin, 1832.

Assumpsit for money had and received. The defendant was a creditor of an intestate estate, and the plaintiff the administrator. The plaintiff, supposing the estate solvent, had paid the defendant several sums upon his demand, but, upon final settlement with the court, found the estate insolvent, and that he had paid the defendant more than his distributive share. Having given the defendant notice and demanded repayment of the overplus, and being refused, the plaintiff brought this suit to recover it. The parties had once arbitrated this dispute, and obtained an award, but afterward had agreed to set the award aside, and to submit again, which had not been done.

O. PARISH, for defendant, objected that the plaintiff could not recover:

1. Because the plaintiff paid the money at his peril, being chargeable with knowledge of the situation of the estate.

2. Because he paid as administrator, and seeks to recover back in his individual right.

3. Because the parties are concluded by the arbitration, and the agreement for a second submission is void, because procured from defendant by threats.

WILCOX, for plaintiff, cited 3 Ohio, 573.

Judge WRIGHT delivered the opinion of the court:

The facts in this case are agreed, and we are to apply the law to the facts. It is an admitted rule, that when money has been paid *by mistake*, it may be recovered back in this action. It appears to us the payment in this case was made under a mistaken understanding of the true situation of the estate. The administrator was under no obligation to pay before the true situation of the estate was ascertained; and if he paid to accommodate creditors, he had a right to require security to refund, if it turned out the *sum paid was more than the creditor's dividend. In [537 case suit is brought, the law provides that administrators shall only be liable for assets, and that, too, notwithstanding he may never have got into legal difficulty by negligence, or false pleading. 29 Ohio L. 255; 5 Ohio, 87. This court has determined that if an administrator prefer one creditor to another, the amount overpaid was, as to other creditors, assets in his hands. 5 Ohio, 87. Even upon a forthcoming bond, by an administrator, it has been held in Virginia, that if afterward it turned out that the estate was insolvent, by the exhibition of new claims, the administrator was only liable for the distributive share of the assets. 1 Rand. 421. We think it just and equitable, as well as lawful, to infer a promise to repay the sum received more than was due, from the fact of its receipt through mistake.

The suit is correctly brought by the plaintiff in his individual character. He is personally responsible to other creditors, and should have a corresponding right to receive the amount. 17 Mass. 380.

The question upon the award is not without difficulty. If it remains in force, it is conclusive against the plaintiff. But the agreed case admits that the parties, after the award, *agreed to*

submit the controversy anew. We think this vacates the first submission and award. The submission gives validity to the award. 3 Ohio, 513. It is, however, said this last assignment was procured by the plaintiff by threatening suit, and so has no legal efficacy. A threat could not affect the obligation, except it amounted to duress. That is not pretended in this case.

Judgment for plaintiff.

538] *MARY LATTIER *v.* ISAAC LATTIER.

Practice in case of divorce.

DECIDED in bank, in 1831, but omitted in the report.

This was a petition for divorce. Several points of practice in this class of cases were settled by the court.

WRIGHT, J., delivered the opinion of the court:

Depositions taken without notice to the adverse party can not be read in evidence. Depositions taken upon notice are only authorized by the statute. 29 Ohio L. 123. The law requires, before the taking of *any such* deposition, that notice in writing of the time and place, etc., shall be served *on the adverse party*, or his *agent*, or *attorney*, or *left at his place of abode*, at least one day for every twenty miles distance, exclusive of Sundays. The depositions offered in this case have been taken without notice, or upon notice published in a newspaper, and are claimed to be read because the defendant has no known agent or attorney, or known place of residence. The case is not embraced in the statute, and if it be desired to change the law in this class of cases, application should be made to the legislature, not to the court. We have no authority to receive the depositions. It is not necessary to decide whether, in any case, the court would feel authorized, from the analogy of the practice in our proceedings for divorce, to issue a *dedimus* to take testimony. No *dedimus* was asked for or obtained in this case.

Petitions for divorce, under the laws of this state, as they now stand, 29 Ohio L. 431–434, should contain the following allegations:

1. That the petitioner, at the time of filing the petition, is an actual resident of the county where it is filed.

2. That he or she had a *bona fide* residence in the state at least two years before this application.

3. The time and place of the marriage, and the names and ages of the children, if any.

4. A specific, brief statement of the cause of praying for a divorce; and if adultery be the cause, a statement of *the time [539 and place of the offense, and the person with whom, if known, and if unknown, show that excuse for the omission.

5. If alimony be sought for, the petition should set out, as near as may be, the kind and amount of the personal property, and describe the real estate of the defendant.

The petition must be filed at least three months before the term of the court at which the application is to be made, and if the defendant lives in the county, a copy of the petition must be served on the defendant within one month after filing, and also a summons to appear and answer. If the defendant is not a resident of the county, public notice is to be given in one of the newspapers of the state, continued for three calendar months before the first day of the court, and the notice proved by affidavit of its publication, with a copy of the advertisement affixed. This should be filed before the cause is called on to hearing.

Mary Houpt v. George Houpt.

Practice in case of divorce.

Before Judges Hitchcock and Wright, in Morgan, 1832.

Application for divorce on the ground the defendant had a former wife living at his intermarriage with the complainant. Evidence was offered to prove the former marriage by cohabitation and reputation.

By the Court:

Section 4 of the divorce act, 29 Ohio L. 432, authorizes the court, in its discretion, to admit proof of cohabitation and reputation *as evidence of the marriage of the parties.* We understand the marriage referred to here, which, in our discretion, may be proved by

reputation, etc., to be *the marriage of the parties to the suit, sought*
540] *to be dissolved.* *The evidence now offered we have no authority to receive. The discretion vested in us in the case provided for should not be exercised to admit the reputation proof without some reason is shown to excuse the production of better proof of the fact of marriage.

BANK OF THE UNITED STATES *v.* HEIRS AND ADMINISTRATORS OF JOHN H. PIATT.

Quære, if administrators can release equity of redemption in lands, except under a decree of the court. This doubt sufficient ground for a decree.

THIS cause was adjourned here for decision from the county of Hamilton. It was a bill in chancery for confirming an arrangement between the complainants and the administrators and heirs of John H. Piatt, deceased. The case is stated in the opinion of the court.

H. STARR, for complainants.

LANE, J., delivered the opinion of the court:

In 1820, John H. Piatt, in pursuance of a previous agreement, executed and delivered to the plaintiff a mortgage on divers parcels of real estate in Cincinnati, to secure the payment of two hundred and sixty-one thousand six hundred and thirty-one dollars and sixty-four cents. In drawing this mortgage, by mistake lot No. 9 was imperfectly described. Mr. Piatt died in 1822, intestate and insolvent. A negotiation was commenced by the administrators, which produced an arrangement by which the widow, heirs, and administrators, released the equity of redemption to the bank, who consented to receive it in satisfaction of the debt. By this release the mistake in the mortgage was corrected, and the bank have possession of the omitted lands.

This arrangement is a very beneficial one for the estate, the mortgaged property not being so valuable as the debt. If it stands, all parties to it are content. But doubts are entertained
541] whether the administrator can release the equity *of re-

demption, so as to bind the interests of the estate, and this bill is brought to remove them; and it further alleges that the mortgage debt is still due if the above arrangement be not valid.

We think the plaintiffs are entitled to the decree. Although the mistake is corrected, in respect to the heirs, and their right of redemption is extinguished by the release, it is doubtful if the administrators have power to do this, except by an order of court. An equity of redemption is real estate vesting in the heirs; yet the administrator has an undoubted right to redeem, and the correlative right to foreclosement exists in the bank. We need not adjudge whether the personal representative can extinguish the right, in his own hands, or in the hands of any future administrator, since the bare doubt, the suspicion thus thrown upon the title sufficiently authorizes the action of the court, to quiet the party in possession.

A further ground of jurisdiction may be found in this case, in the mistake, which in respect to administrators, and the interests they represent, could not be effectually corrected, except by bill.

A decree may be taken, correcting the omissions in the mortgage deed. And as an appraisal has been had, by which it is ascertained that the land if sold at its appraised value, would not pay the debt, it may be further provided, that unless the administrators pay the debt and cost within sixty days, their right to redeem shall be foreclosed.

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*In the Matter of James Turner. [542

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Prisoner indicted for murder in the common pleas, when arraigned, stands mute. The court, assuming that another indictment against him, for the same offense, was pending in the Supreme Court, refuse to proceed in the case. *Mandamus* to proceed a proper remedy.

Prisoner in the penitentiary, judgment reversed for error, new trial to be had before the court where the original conviction was had.

This was adjourned here for decision from the county of Fairfield. It was a motion for a *mandamus*, to the court of common pleas of Fairfield county, commanding that court to proceed to the trial of James Turner, upon an indictment for murder. The case is stated in the opinion of the court.

H. H. HUNTER, for the mandamus.

G. SWAN, against it.

Judge LANE delivered the opinion of the court:

In the court of common pleas, of March term, 1832, James Turner was indicted for murder. On his arraignment, it was demanded of him in which court he elected to be tried, to which demand he stood mute. Upon which, the court, "having advised upon the matter of the prisoner's standing mute, when interrogated whether he elected to be tried in the Supreme Court, upon the indictment found this term, is of opinion that the court has no jurisdiction of the case, because upon a former indictment for the same cause, the same prisoner elected to be tried in the Supreme Court, and because the same indictment is still pending and undetermined." Upon this, Mr. Hunter, the prosecuting attorney, at the November term of the Supreme Court of Fairfield county, moves the court for a *mandamus*, commanding the judges to proceed in this cause, in such manner that the defendant may be brought to trial, in due course of law.

By section 3 of the act to organize judicial courts, power is given to the Supreme Court to issue writs of *mandamus*, and all other writs not specially provided for, to enforce the due administration of right and justice throughout the state. The occasions upon which the writ is to issue are not pointed out, and it is not necessary to recur to the common law, to learn in what cases the writ is properly applicable.

"The original nature of the writ," as is said in 3 Burrows, 1267, 543] "and the end for which it was formed, direct on *what occasions it shall be used. It was introduced to prevent disorder, from a failure of justice, or a defect of police; therefore it ought to be used upon all occasions where the law has established no specific remedy, and where in justice and good government, there ought to be one." It has become an established remedy, is a matter of every day's use, to compel courts and magistrates to execute their official duties.

The most usual object sought by this writ is to exact the execution of some official duty from a ministerial officer; but it is equally applicable to compel courts to do that justice which the law enjoins them to administer. Whenever an inferior court refuses to

exercise its jurisdiction, the writ of *mandamus* is the appropriate remedy. Examples are numerous in the books, in which this power has been exercised. It has been issued to the quarter sessions, to compel them to give judgment for abating a nuisance. Andrews, 188. To command them to receive an appeal. Sessions Cases, 248. To the court of Sandwich, to give judgment, in an action of assault and battery. Strange, 113. To a sheriff's court to give judgment in a writ of inquiry. Strange, 392. To the bailiffs of Andover, to give judgment in a depending case. 2 Barnardiston, 259. It has been issued by the Supreme Court of New York, to the sessions, to compel them to give judgment. 1 Johns. Cas 279. To the court of common pleas, to compel them to enter judgment. 1 Johns. Cas. 181; 2 Johns. Cas. 215, 371; 19 Johns. 147. It has been granted in Massachusetts, to compel the court of sessions to enter the verdict of a jury, in the assessment of damages. 9 Mass. 383; 5 Mass. 435. And it has been issued from the Supreme Court of the United States, to a district judge, to cause him to execute his sentence. 6 Cranch, 115. In short, as said by Chief Justice Parker, of Massachusetts, 2 Pick. 414, by this process the superintending court can compel the performance of duty by all the inferior tribunals, whether that duty be ministerial or judicial.

These authorities leave no doubt, that the writ may issue, commanding the court to act; but care is to be taken that it shall not interfere with the full and legitimate exercise of *judgment [544 in the court to which it is directed. It is not a remedy adapted to correct errors, or to constrain them to act in a particular manner; although it may compel a judge to proceed to judgment, it will not prescribe what judgment to give. 3. Dall. 45. In all these cases, the full object of the writ is obtained, if it produces the action, and calls forth the exercise of jurdisdiction.

In the present case, the prisoner while arraigned on an indictment, before the court of common pleas, stood mute. Instead of instituting an inquiry into the cause of his refusal, as the law directs, the court, without plea from the defendant, and without affording the attorney for the state the opportunity of contesting the position, assumed the fact that another indictment was pending in this court for the same offense, and that the pendency of it destroyed their jurisdiction. If they had gone further, and quashed the indictment for the want of jurisdiction, perhaps this might

have been the exercise of such a judicial discretion, as would have been beyond the reach of their power. But this was not done; the court abstained altogether from doing anything, and a failure of justice is likely to arise from their want of action. We unite in the opinion that this is a proper case for a *mandamus*.

The first process in that case must be a rule to show cause.

In the Matter of Samuel Kazer.

Adjourned from Delaware county.

Judge Lane delivered the opinion of the court;

The case of Samuel Kazer bears some resemblance to that of Turner. He was tried in the court of Delaware county for arson, and committed to the penitentiary. A writ of error was had, and 545] the judgment was reversed for *errors in the proceedings of the common pleas, the court being of opinion that a new trial ought to be granted. The journal entry was nearly in the words of the statute, commanding the clerk to certify these proceedings to the keeper of the penitentiary, but it contained no order to the common pleas to proceed in his trial, nor does the statute require in terms the entry of such an order. The statute in these cases requires the keeper of the penitentiary to take the person to the county from which he was sent, and commit him to the custody of the sheriff. These requisitions were complied with, but the court of common pleas declined proceeding in the trial, being of opinion that they had no jurisdiction. This court can discover no weight in the objections of the common pleas to proceeding in this trial, when the prisoner stood indicted before them of a crime, which they alone, by the constitution, are competent to try; and are opinion that a *mandamus* might be issued to compel them to act; but as a peremptory *mandamus* is not ordered in these cases in the first instance, we believe the ends of justice will be attended with equal certainty and more speed by *procedendo*.

SILVER LAKE BANK *v.* A. AND S. HARDING.

Justice's court, in Pennsylvania, is not a court of record within the provisions of the constitution and laws of the United States; but their judgments, when duly proved, are within those provisions, to which full faith and credit must be given, though to debt upon them *nil debet* is a good plea.

THIS cause was reserved in the county of Richland. It was an action of debt upon the transcript of a judgment of a justice of the peace, in the State of Pennsylvania. The question to be decided arose upon the plea of *nil debet*, which was demurred to.

COFFINBERRY, for the plaintiff, cited 5 Bin. 484; 11 Johns. 166; 16 Johns. 233; 5 Ohio, 183; 1 Saund. Pl. & Ev. 406; 2 Saund. 187; 1 Chit. Pl. 452; 1 Stark. Ev. 208; 1 Ohio, 259; 4 Bin. 67; 1 Bin. 222, 383.

*PURDY, for defendants, cited 2 Stark. Ev. 568; 3 Esp. 163; [546 4 Conn. 517; 5 Johns. 37; 9 East, 192; 1 Stark. Ev. 215; 19 Johns. 162; 1 Johns. Ch. 104; 1 Johns. Cas. 246.

COLLET, J., delivered the opinion of the court:

This is an appeal from Richland common pleas, reserved on the last circuit for decision here. It is an action of debt on a transcript of a judgment of a justice of the peace of the State of Pennsylvania. The defendant pleaded, first, *nul tiel record;* second, payment; third, *nil debet.* On the two first pleas, issue was joined; to the third, the plaintiff demurred, and the defendant filed a joinder. Is *nil debet* a good plea in this case, is the only question.

The constitution of the United States provides that, "Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state, and the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof." Congress, in May, 1790, enacted, "That the records and judicial proceedings of the courts of any state shall be proved or admitted in any other court within the United States by the attestation of the clerk, and the seal of the court annexed, if there be a seal,

together with a certificate of the judge, chief justice, or presiding magistrate, as the case may be, that the said attestation is in due form, and the said record and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States, as they have by law or usage in the courts of the state from whence the said records are or shall be taken." A justice's court, in Pennsylvania, is not a court of record; a docket and short minutes of his proceedings are all that is kept by the justice, such as is kept by our justices of their proceedings. In Pennsylvania, the courts consider the justice's an inferior court, and not a court of record. 2 Bin. 222. Then, *nil debet* would there be a good plea; if good there, it would be good here; if the act of Congress applied to it, it would be 547] giving it the same faith *and effect that it receives in Pennsylvania. 7 Cranch, 483. The act of Congress does not extend to such judicial proceedings. It provides for certifying the proceedings of a court having a clerk, a judge, or presiding officer, and usually a public seal, in a court of record, to apply it to the justice's court; he is both clerk and judge, he has a public seal, he must under his own hand and private seal certify his transcript and without other evidence of his being a justice, or any proof of his handwriting, we should have to receive in evidence a transcript of the docket from Pennsylvania, or elsewhere. Congress did not intend this. In Massachusetts, it has been determined that the law of Congress does not embrace the proceedings of a justice of the peace of the State of Connecticut; and that to an action of debt on a transcript of a justice of Connecticut, *nil debet* was a good plea. 3 Pick. 448.

In this state actions have frequently been brought on the judgments of justices of the peace of the adjoining states; some in assumpsit, some in debt. They have both been sustained by the courts. The pleas of *nil debet* and of *nul tiel record* have both been sustained; and it has, we believe, been uniformly decided that the mode of certifying such judgments is not prescribed by the act of Congress. The courts have invariably required other evidence of the person who certifies the transcript being a justice than his own certificate; usually the certificate of the clerk of the court of the county and the seal of the court.

This judgment, although not embraced within the act of Congress, is within the provision of the constitution. It is a judicial pro-

ceeding to which full faith and credit is to be given; A state or nation is bound, and has the exclusive right to administer justice within its territories to parties there contending. When the parties have had an opportunity of being heard, and a definitive decree has been pronounced, a regard to this right and duty of every state and nation, and to justice, requires that the justice of the sentence should not be re-examined by the tribunals of another state or nation, unless it is shown that the sentence was obtained by fraud. 2 Vat., chap. 7, sec. 84. The courts in England had not uniformly regarded this principle of the *law of nations; [548 therefore, it was, it is probable, that this was introduced into our constitution. Whether the court is a court of record or not, if it had jurisdiction of the matter and of the parties, its decision is conclusive, and until it is reversed the parties can not again litigate the same matter, unless there was fraud in obtaining the sentence. 1 Stark. Ev. 191, 208. It is as conclusive here as in Pennsylvania and no more so. This is the effect it is to have whenever it is given in evidence. That the plea filed in the action is called *nil debet*, *non assumpsit*, or *nul tiel record*, can make no difference. 2. Pick. 448; 1 Stark. Ev. 213. In England, since her union with Ireland, a judgment of an Irish court of record is treated as domestic and not foreign, and the plea of *nul tiel record* is received in an action of debt on such judgment; but the plea must conclude to the country, for the mode of proof is by sworn copy, and there must be a jury to try the credit of the witness. 5 East, 473. Upon the whole the demurrer must be overruled.

McCoy and Culbertson v. The President and Directors of Bank of United States.

Indorsers charged at law, on the ground of being secured, subsequently, by a decree in chancery, are deprived of the security fund, in favor of a previous lien, can not be relieved in equity.

This is a bill of review, reserved in the county of Ross, on the last circuit. The original bill states that Matthew Waddle, on March 9, 1819, made a promissory note, payable, sixty days after

date, to John Waddle or order, at the office of the Bank of the United States in Chillicothe, for one thousand dollars, which was indorsed by John Waddle and the firm of McCoy & Culberston, and discounted by the bank for Matthew Waddle. That when the note became due, notice, but not legal, was given to the indorsers. That at December term, 1820, of the Supreme Court for Ross county, the bank recovered a judgment against the maker and indorsers of the note, for one thousand and ninety-five dollars damages, and seventy-six dollars and seventy-five cents penalty, with costs. 549] That on the trial the *bank did not prove a legal notice to the indorsers of the non-payment of the note, but relied on a deed of trust made by Matthew Waddle to W. K. Bond, to indemnify the indorsers, dated October 9, 1818, and that the court charged the jury that the deed of trust made it necessary for the bank to prove the notice to the indorsers, in order to recover, on which the jury found a verdict against the indorsers. That the court, on being moved for a new trial by the indorsers, adhered to their opinion and refused it. That on November 2, 1821, Job Harness filed a bill in chancery against M. Waddle's heirs, John Waddle, and McCoy & Culberston, on a mortgage of the premises covered by the deed of trust; the mortgage was made to Harness by Matthew Waddle and his wife, to secure the purchase money due to Harness for the premises, on April 18, 1817, but not recorded until May 1, 1819. That the Supreme Court, on hearing, decreed the deed of trust to Bond void, and ordered a sale of the premises to satisfy the mortgage of Harness. The bill and proceedings of Harness are referred to, and prayed to be made a part of the bill. That the premises were sold on the decree and did not sell for a sum sufficient to pay the mortgage. That when the action at law was tried, the complainants believed the deed of trust valid, but the decree has deprived them of the benefit of it. The bill prays a new trial to be ordered, etc.

The bank, by Creighton and Bond, answered that they authorized L. Belt to give the indorsers due notice of the non-payment of the note by the maker, which they presume he did; that they do not know whether evidence of notice was or was not given; that with the deed of trust evidence was introduced to show that it contained all the property of M. Waddle; that the indorsers availed themselves of every species of defense; that the bank admits the proceedings in chancery by Job Harness, referred to by

the bill, and insists that the decree was founded on the knowledge of McCoy & Culbertson, and John Waddle, of the mortgage when the deed of trust was made, and that the mortgage did not include the personal goods conveyed by the deed of trust. The common replication was filed.

*The deed of trust to Bond, dated October 9, 1818; the [550 notes given to the bank by the parties, from the making of the deed of trust, renewed from time to time until March 9, 1819; the date of the note on which the judgment was obtained; the notice of non-payment, dated May 12, 1819, given to the indorsers the day after; the mortgage to Harness, dated April 18, 1817, and recorded May 1, 1819; and a deed from Harness to M. Waddle for the same premises of the same date; and an article between Harness and M. Waddle for the sale of the premises, dated March 13, 1817; and a transcript of the proceedings and decree in the case of Harness against the Waddles and McCoy & Culbertson were all exhibits in the cause. Also, an agreed statement that by the trust deed McCoy & Culbertson had secured six hundred dollars, and that they had paid for liabilities intended to be secured by that deed two thousand four hundred and sixty-seven dollars and sixty-three cents. The court, on the hearing, were divided in opinion, and dismissed the bill. 2 Ohio, 336. The bill of review states that the complainants have paid the costs of the original suit, and that the judgment at law is paid; that the one-half paid by them amounted to one thousand dollars. They assign general errors in the decree. The defendants demurred, and the plaintiffs have joined in demurrer.

LEONARD, for complainant.

G. SWAN, for defendant.

COLLET, J., delivered the opinion of the court:

It is urged for the complainants that the court of law, at the trial of the action against the indorsers, on the authority of the case of Bond *v.* Freeman, 5 Mass. 170, determined that where the maker of a note transferred all his property to the indorsers for their indemnity, or a sufficiency for that purpose, they could not object to a recovery against them by the holder of the note that they had not notice of non-payment by the maker, for the notice

was to enable the indorser to secure himself, if he could, from the 551] maker, and that when *he had before secured himself, notice could be of no service; that the deed of trust to Bond was considered as either a sufficient indemnity to the indorsers, or as containing all the property of the maker; that on these grounds a recovery was had against the indorsers. That this being the law, as laid down by the court, on its afterward appearing, by the decree for Harness and the sale of the premises contained in the mortgage and deed of trust, that the property conveyed by the deed of trust was not sufficient to indemnify the complainants, the indorsers are now entitled to relief in this court, by an order for a new trial at law or a final decree here.

The mortgage to Harness was made in 1817; it was not recorded until May, 1819. The deed of trust to Bond was made in October, 1818, for the indemnity of the indorser; it included the land mortgaged to Harness, and other property, part of it personal, of which the complainants made six hundred dollars. The complainants relied on the want of notice of the mortgage of Harness as a defense to his suit, but the court on the hearing decreed for Harness, which must have been on the grounds that the complainants, when the deed of trust was made, had either actual or constructive notice of the mortgage. If they knew of Harness' mortgage, when their trust deed was made, or at the time of the trial at law, why did they not then proceed and insist on it? The deed of Harness was recorded in May, 1819; the trial was in November, 1820, eighteen months after. Constructive notice of this mortgage must have been a knowledge of such facts, by the indorsers or their agents, relating to the mortgage, as would have led prudent men to an actual knowledge of it, so that the indorsers or their agents must have been chargeable with some negligence, at least, in not relying on this mortgage as a defense at law. It is suggested that in equity the indorsers were trustees of the property contained in the trust deed, that it really belonged to Mr. Waddle, the maker of the note, and that the indorsers, as trustees, were bound not to do anything which might lessen the value of the trust fund. This is a poor excuse. Where a mortgagee, confiding in the mortgagor, or as his friend to save his credit and 552] feelings, does not record his mortgage, and the mortgagor *is base enough to convey or mortgage over him to defeat his mortgage, are those to whom he conveys or mortgages under obliga-

tions to *him* to do all they can to aid him in committing such a fraud?

The action at law was tried in 1820; it is a fact known to us all, without proof, that real property in general, especially if improved, would at that time readily sell for one hundred per cent. more than in 1822, or for several years after. The decree for Harness was in 1823. When the property was sold by Bond, the trustee, we do not know. If the price of land had not fallen after 1820, there might have been no loss. If this occasioned the loss, the equity of the bank to retain is at least as good to retain as that of the indorsers to recover back the amount of notes discounted on their credit.

The value of the property contained in the trust deed was a matter investigated on the trial at law; if this mortgage was known of by the indorsers at that time, this court can not relieve them. Why did they not produce it, or move for a new trial to obtain time for its production? It seems probable that they either knew of it, or that their want of knowledge was from negligence. In either case no relief should be granted by this court. 4 Ohio, 464; 3 Johns. Ch. 750; 7 Cr. 332.

If the inquiry, on the trial at law, was not only as to the sufficiency of the property in the trust deed, but whether it was all of M. Waddle's property, the cause may have gone off on that ground; then, according to the opinion of the court of law, its value would make no difference. If all is secured, why give notice to the indorser? He can get no more.

The court of law had the right finally to try, and we have no right to inquire whether they erred or not. They had the right to determine whether notice was necessary or not, what was an excuse for the want of notice, and what was sufficient proof of that excuse. They did so on the trial, and on a motion for a new trial were satisfied with their determination. Again, M. Waddle was in such circumstances that before complainants would indorse his note he had to indemnify them. The indorsers paid the notes; he was insolvent. It is probable, then, that the bank advanced *the amount of the note to M. Waddle, on the credit of the [553 indorsers alone. The bank intended to give the indorsers immediate notice of the non-payment of the note, but by the mistake or negligence of their agent, they did not receive notice until two days after the note became payable; no injury was sus-

tained by the indorsers in consequence of this delay. Now, could justice be advanced by taking this money from the bank and giving it to these indorsers? Has not the bank as much equity to retain it as the indorsers to receive it?

Anciently an indorser was compelled to show a loss from not receiving notice, before he could successfully insist on a want of notice; now, the law presumes an injury, and will not suffer the presumption to be rebutted except in a few cases. Chit. on Bills, 214, 215, 552. And this is well on many accounts; it protects more persons who would have suffered by a want of notice and could not prove the injury, than it discharges of those who suffered no loss. If an indorser, who has not received notice on the day the rule requires, but who has suffered no loss thereby, should be adjudged to pay, would he have an equity to recover back? Unless the judgment was obtained by fraud, I should much question it.

This case differs from that in 2 Vern. 146, of the executor, who informed the creditor of the testator that he had a mortgage securing a debt to the testator of three hundred pounds, on which information the creditor recovered a judgment against the executor for the debt to be levied of his goods. Afterward, it appeared that the premises were covered to their full value by prior mortgages; the executor was relieved; he had not caused the creditor to let the testator have the consideration of his debt; he had done nothing but disclose the fact of the existence of the mortgage as a source of ultimate payment to the creditor. The creditor had in consequence sued him. The costs, if the chancellor chose, could be thrown on the executor. Could an honest man have received of the executor this judgment so recovered?

Upon the whole, we are of opinion that this bill must be dismissed.

554] *C. Higgins v. T. West.

Practice in decreeing a sale of mortgaged premises on a foreclosure.

This suit is reserved from Franklin county, to settle the form

of a decree, in cases brought to collect money secured by mortgage.

L. STARLING, for complainant.

Judge LANE delivered the opinion of the court:

In all cases of this nature, the mortgagee may insist on a sale; and he is entitled to a decree for foreclosure, where two-thirds the value of the mortgaged tenements does not exceed the amount of the debt. 1 Ohio, 235.

Where a sale is to be made, it is the interest of all that no unnecessary delay should be made. In these cases, after the amount due shall be ascertained, either by computation or by reference to the master, a decree may be entered, commanding the master to make the amount of money due, by sale of the mortgaged tenements (or of so much as may be necessary), under the forms and restrictions prescribed by the statute for the sale of lands by execution at law.

But where the debt can not be paid by a sale of the land, and the mortgagee is desirous to purchase, the value should be ascertained in some mode analogous to that directed by the execution law. A decree may be entered, directing the master to cause a valuation, in the manner prescribed by that statute, and upon its return, a decree be entered, either for foreclosure or sale, as the appraisement may justify; and in the event of a sale, no new valuation will be required; and this case will not cause the delay of a term, if this return of the value can be made during the session of the court.

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*BENJAMIN M. PIATT *v.* HEIRS OF ST. CLAIR AND BANK OF THE UNITED STATES AND OTHERS. [555

Though administrator may have disposed of all the estate of an intestate, yet if he decease, no legal proceeding can be had to charge the estate without appointing administrator *de bonis non*.

THIS was a suit in chancery adjourned from the county of Hamilton. The object of the bill was to charge the real estate of

the late Arthur St. Clair, deceased, in the hands of the defendants, with the payment of a debt of the intestate. Administration had been granted, and all the estate, real and personal, disposed of, by the administrator, who died after the commencement of this suit. No administrator *de bonis non* having been appointed, a question was made whether the cause could proceed without such appointment, and the person receiving it being party defendant to the suit.

CASWELL and STARR, and HAMMOND, for the complainant, insisted that an administrator *de bonis non* need not be appointed. The whole estate having been disposed of, and the defendants being alone interested in resisting the debt, and in protecting the property against being subjected to the payment of it, there was nothing for an administrator *de bonis non* to do.

N. WRIGHT and WORTHINGTON, for the respondents, suggested that if the court were of opinion that a valid decree could be made, as the case stood, they were satisfied.

By the COURT:

It is safest to make the appointment. It has always been held that to charge a decedent's estate with his debts, there must be a personal representative to proceed against. We are not willing to make a new precedent. The cause will be continued that the appointment may be made, and the party brought before the court.

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1. When a creditor is appointed administrator to his debtor, and dies having received no assets, the debt is not extinguished, nor is there a presumption of payment. Hall, etc. *v.* Pratt, etc. 81.
2. Where intestate's estate is solvent, including the realty, it is a devastavit in the administrator to pay out all the personal estate to one creditor, and take no measures to sell the realty. Abbott, etc. *v.* Cole, etc. 87.
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2. On appeal from the common pleas to the Supreme Court, the bond must be for double the amount of debt and costs of the appeal, excepting the appellant's costs. Bliss *v.* Long, 337.
3. In suits before justices of the peace, brought by paymaster to recover militia fines, an appeal lies from the judgment of the justice to the common pleas. Wright *v.* Munger, 442.
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3. Deed, made by infant *feme covert*, may be disaffirmed by her, at any time before the statute of limitations, would bar an ejectment. Drake's Lessee *v.* Ramsay, etc. 252.
4. Auditor's deed for land sold for taxes, is not *prima facie* evidence of regular sale, unless introduced with copies of the intermediate proceedings on the auditor's books. Carlisle's Lessee *v.* Longworth, 370.
5. Deed describing the land conveyed as half the tract granted to M., January 9, 1804, *prima facie* a good description. McChesney's Lessee *v.* Wainwright, 453.

DEPOSITIONS—

Depositions taken before the mayor of Alexandria, District of Columbia, could not be read under the statute of 1824. Gibson, etc. *v.* McArthur, 330.

DIVORCE—

1. Where petitioner for a divorce resides in one county, and defendant in another, personal service of process is not sufficient; there must be publication. Harter *v.* Harter, 319.
2. Mode of proceeding and rules of evidence in divorce. Lattier *v.* Lattier, 538; Houpt *v.* Houpt, 539.

EQUITY—

1. Equity will enjoin a sale on execution, where the sale could confer no title, but would cast a cloud on that of the complainant. Norton v. Beaver, etc. 179.
2. Errors of courts of law can not be corrected in equity. Spencer v. King, 183.
3. Equity will restrain the doing of any act, by which irreparable damage may be done to individuals, or a great public injury ensue. Putnam v. Valentine, etc. 188.
4. Equity will not, at the suit of a supervisor of a public road, enjoin obstructions upon it. Ib, 189.
5. Complainant, in possession of land and having the better legal title, may come into equity to quiet that title against those asserting a claim. Douglass v. Scott, 194.
6. Damages by opening alleys in towns, under town ordinances, can not be sought in equity, nor relief granted against regular assessment. Symmes v. Cincinnati, 224.
7. Equity will not interfere to direct a new partition, for irregularity in one fairly made, where parties took possession and improved and several years of acquiesence have elapsed. Piatt, etc. v. Hubbell, etc. 243.
8. The defendant, in answer to a bill of discovery introduces new matter, not responsive to the bill, it can not be read on trial. Methodist Church v. Wood, 285.
9. Equity will aid a surety for two partners, where one is dead and the other insolvent, by proceeding against the estate of the deceased partner, without prosecuting a suit against the survivor. Horsey v. Heath, etc. 355.
10. Where contract for the sale of land existing in parol and partly executed, by putting the vendee into possession, is put an end to by the vendor, and the vendee dispossessed, equity will relieve, though the terms of the contract may be indefinite. Welsh v. Welsh, 427.
11. In equity, the defense of a former decree on the merits must be presented by plea, and can not be taken by demurrer. Ferguson v. Miller, 460.
12. Bill in equity is considered pending, when the party is served with process or the notice duly published. Bennett's Lessee v. Williams, 462.
13. Equity will not relieve against conveyance made by a person in prison on a criminal charge, of an estate worth two thousand five hundred dollars, in consideration of becoming bail, and an annuity of one hundred dollars a year, no fraud being proved. Knobb v. Lindsay, 470.
14. Doubt whether administrator, who has released equity of redemption in his intestate's land, had power to do so, ground of equitable jurisdiction to confirm such release. Bank U. S. v. Piatts, 541.
15. Equity can not relieve indorsers charged at law, on the ground that a supposed indemnity had been subsequently taken from them by a decree in chancery upon an elder lien. McCoy, etc. v. Bank U. S. 550.

ERROR—

1. Question of fact, whether a note offered in evidence in support of an indictment charging a counterfeit subscribed H. or N. Biddle, not examinable upon error unless the note is part of the record. Hess *v.* Ohio, 8.
2. It is not error to charge, in indictment, that the offense set out was felonious, when the law did not make it so. Ib. 12.
3. No writ of error lies to a judgment rendered by the court in a case where the questions of fact were submitted to them for decision. Reynolds, etc. *v.* Rogers' Ex'rs, 171.
4. Bond on writ of error valid, though not strictly in the terms of the statute. Consideration not to be questioned. Ib. 176.
5. Error at law not corrected in equity. Spencer *v.* King, 183.
6. In trespass, pleas not guilty and justification, verdict guilty and entire damages assessed, the plea of justification not being noticed, it is error Hanly, etc. *v.* Levin, 238; Powell *v.* Harter, 260.
7. After writ of error sued, matter of form can not be amended in the Supreme Court. Hanly, etc. *v.* Levin, 239.
8. If the court err, in stating an abstract proposition, not applicable to the cause, it is no ground to reverse a judgment or grant a new trial. Reed *v.* McGrew, 385.
9. Where there are several counts in a declaration on a contract, one of which is bad, and entire damages are given, judgment for the plaintiff is erroneous. Nelson *v.* Ford, 476.

ESTOPPEL—

1. Deed not attested by two witnesses and containing no covenant of warranty, does not work an estoppel. Patterson's Lessee *v.* Pease, etc. 190.
2. Conveyance made by a defective deed, before a patent issues—the grantee conveys by deed duly executed, with warranty, and puts his grantee in possession, when the patent issues it inures to the latter grantee, by way of estoppel. Douglass *v.* Scott, 195.

EVIDENCE—

1. It is competent to receive the evidence of the teller of a bank to prove the handwriting of the president and cashier, although he never saw them write. Hess *v.* Ohio, 6, 7.
2. In trial upon an indictment for having counterfeit bank notes in possession, it is admissible to prove that other counterfeits were found secreted in the defendant's house and in possession of his wife. Ib. 9.
3. Bank note offered in evidence, upon an indictment charging that it was subscribed *H. Biddle*, whether the actual signature was N. Biddle or H. Biddle, is a question of fact that can not be investigated in a writ of error, unless the note is attached to the record. Ib. 8.
4. Whether a constable's bond was duly made and accepted may be proved by parol. Westerhaven *v.* Clive, 138.
5. Evidence admissible, but admitted for an erroneous reason, does not vitiate a verdict. Ib. 138.

EVIDENCE—*Continued.*

6. A defendant can not make it a ground of exception that the plaintiff gave evidence of facts he was not bound to prove. Reynolds, etc. *v.* Rogers' Ex'rs, 171.
7. A collector of taxes, in making defense, need not prove anything more than that he acted and was reputed to be a collector. Eldred *v.* Sexton, 216.
8. After an attempt to prove the truth of a plea of justification in slander, evidence of plaintiff's general bad character may be given, but not in any particular. Dewitt *v.* Greenfield, 225.
9. Where words are spoken after a term commences, and suit subsequently brought, declaration as of the term, the writ is evidence of the time the suit was actually commenced. Ib. 227.
10. Trust might be created in real estate by parol, and proved by parol, before the statute of frauds of 1810. Fleming, etc. *v.* Donahoe, etc. 256.
11. Parol proof admissible to prove the opening and using a public road, though not laid exactly on the course described in the survey. Arnold *v.* Flattery, 273.
12. On an issue out of chancery to try the validity of a will, defendant's answer is not to be read as evidence. Green *v.* Green, 278.
13. Two persons separately indicted for the same arson. One tried and convicted. The record is not evidence on the trial of the other. Kazer *v.* The State, 280.
14. Member of a religious corporation having no separate interest, is admissible as a witness where the corporation is a party. Methodist Church *v.* Wood, 264.
15. Answer to a bill of discovery introducing new matter, not responsive, can not be read. Ib. 285.
16. Until act of March, 1831, depositions taken before the mayor of one of the cities in the District of Columbia not admissible. Gibson, etc. *v.* McArthur, etc. 330.
17. Plaintiff is competent to prove book accounts continuously and fairly kept, within eighteen months of closing the account. James *v.* Richmond and Bostwick, 338.
18. Deed from county auditor for lands sold for taxes, not evidence, unless sustained by transcripts of the proceedings on the auditor's books. Carlisle's Lessee *v.* Longworth, 370.
19. Confessions of an alleged horse-thief, that he had stolen the horse, made in defendant's presence, can not be given in evidence, in support of an indictment for concealing a horse-thief, to prove that the horse was stolen. Morrisson *v.* The State, 439.
20. Parol evidence not admissible to prove an order of court for the administrator to sell a decedent's lands. Newcomb's Lessee *v.* Smith, 450.

EXECUTION—

1. Where a levy, upon an execution, made before the act of 1822, is not set aside under that act, the judgment lien subsists against a purchaser

EXECUTION—*Continued.*

from the debtor; execution levied upon lands after defendant's death, sale void. Lessee of Cartney *v.* Reed, 221.

2. Execution, on judgments, issued after expiration of a year and a day, that first issued and levied has preference. Seller's Lessee *v.* Corwin et al. 408.
3. Purchaser on execution entitled to benefit of occupying claimant law. Ib. 409.
4. Execution once sued on judgment in ejectment, and executed, no second execution can be sued on the same judgment. Hinton *v.* McNeil, etc. 512.
5. Defect in description of property levied on execution may be supplied by parol proof. Douglass *v.* McCoy, 524.
6. Several executions levied upon the same land; a sale upon each is unnecessary. The proceeds made on one should be distributed. Ib. 525.

EXECUTOR DE SON TORT—

No person can be charged as an executor in his own wrong, under the laws of Ohio. Dixon *v.* Cassell, 533.

FEMES COVERT—

A feme covert can make a will under the statute of Ohio. Allen et al. *v.* Little, 67.

FORFEITURE—

1. Tenant suffers land to be sold for taxes, he forfeits his estate. McMillan *v.* Robbins, 30.
2. Can not save the estate by depositing redemption money. Ib. 33.
3. Law imposing the forfeiture is constitutional. Ib. 33.
4. A conveyance on condition that the grantee shall keep a saw and grist-mill in operation on the premises, is a valid one; if the grantee fails to perform the condition, he forfeits the estate. Sperry's Lessee *v.* Pond, etc. 389.

FORGERY—

An indictment for forgery must set out the instrument alleged to be forged. McMillan *v.* State of Ohio, 269.

FRAUD—

1. Voluntary conveyance, by a father to his children, of the principal part of his estate, when liable, upon a contract, for damages, held fraudulent and set aside in favor of the party recovering on that contract. Brice *v.* Myers, etc. 122.
2. Stockholder in an incorporated bank may maintain a bill in chancery against the company, the directors, stockholders and other individuals, alleging fraudulent mismanagement. Taylor *v.* Miami Exporting Co. Co. etc. 165.
3. Before the statute of frauds of 1810, trust might be created in real estate by parol and established by parol evidence. Fleming *v.* Donahoe, 256.
4. Parol agreement to transfer a certificate of an entry for land not within the statute of frauds. Reed, etc. *v.* McGrew, 385.

FRAUD—*Continued.*

5. Where an aged person of weak mind, arrested upon a criminal charge, and in prison, in order to obtain bail, conveys an estate worth two thousand five hundred dollars, reserving an annuity of one hundred dollars per annum during his life, the transaction does not present a *prima facie* case of fraud. Knobb *v.* Lindsay, 471.

FREIGHTER—

Quære, as to the effect of usage in freighting on the Ohio river, upon the contract of affreightment. Lawrence *v.* McGregor, 311.

HUSBAND AND WIFE—

Husband that abuses his wife can not maintain an action against her father who receives and protects her. Rabe *v.* Hanna, 531.

INDICTMENT—

1. Indictment for counterfeiting bank notes need not set out the indorsement on the back. Hess *v.* Ohio, 8.
2. Indictment against two, one tried and convicted; not held error, where it can be inferred from the record an order for a separate trial was made, though such order is not set out. Ib. 10.
3. Two may be joined in an indictment for having counterfeit notes in possession. Ib. 11.
4. Indictment for having counterfeit bank notes in possession and for making sale of them, need not charge that the sale was for a consideration or to the injury of any one. Ib. 12.
5. Upon an indiciment of a single count, for assault with intent to kill, party may be convicted of assault and battery or of assault alone. Stewart *v.* Ohio, 242.
6. In an indictment for forgery, it is necessary specifically to describe that which is charged to be forged, and to set it out in the indictment. McMillan *v.* Ohio, 269.
7. Prisoner indicted stands mute. The court can not assume the reason to be that he is indicted for the same offense, in the Supreme Court, and for that reason refuse to proceed. An inquiry into the cause of his standing mute ought to have been made. Turner's case, 542.

INFANT—

Infant *feme covert* makes a deed. She may disaffirm it at any time before the statute of limitations would bar a recovery in ejectment. Drake's Lessee *v.* Ramsey, etc. 252.

INJUNCTION—

1. An injunction is a proper proceeding to stay a sale on land upon execution where no title could pass, but the complainant's title might be clouded. Norton *v.* Beaver, etc. 179.
2. Injunction not sustained, on complaint of a supervisor of a public road, to enjoin obstructions upon it. Putnam *v.* Valentine, etc. 189.

INSOLVENT—

An insolvent debtor makes an assignment, in trust, for the benefit of preferred creditors, with a clause that those who do not stipulate, within

INSOLVENT—*Continued.*

a time specified, to release the debtor his whole debt for what he may receive under the assignment. Held void as to the creditors that do not stipulate to release. Atkinson, etc. v. Jordan, etc. 294.

INSURANCE—

1. Insurance on a steamboat, her machinery, etc., covers the cost of repairing the articles insured upon, and the expense of towing her to the nearest place of repair, but not the wages and subsistence of hands during the delay. Perry v. Ohio Insurance Co. 306.
2. Insurer does not insure against loss resulting from the negligence of the assured, or those employed by him. Lodwicks, etc. v. Ohio Insurance Co. 435.
3. Masters and marines are agents of the assured. So are navigators of flat-boats on the Ohio river. Ib. 436.
4. Sixth rule of Ohio Insurance Company respecting double insurance, applies to a subsequent as well as to a previous insurance on the same risks. Harris v. Ohio Insurance Co. 466.

INTEREST—

1. Rule for calculating interest on money in a particular state of accounts. Miami Exporting Co. v. Bank U. S. 261.
2. In torts upon chattels, interest may be given by way of damages. Hogg v. Zanesville Canal Co., 424.

JOINT CONTRACTS—

One of several joint contractors sued, without notice of the others in the process or declaration, exception must be taken by plea in abatement, not by demurrer. McArthur v. Ladd, 517.

JUDICIAL PROCEEDINGS—

Loose and vague proceedings of the courts in the first stages of the territorial government, to be sustained if practicable, consistent with principle. Ludlow's Lessee v. Wade, 500.

JUDGMENT—

1. Judgment confessed, upon process issued during the term, and levied within ten days, postponed to a judgment of the same term, at a subsequent day, on process pending at the commencement of the term, though not levied within ten days. Riddle v. Bryan, 50.
2. Judgments and levies, not affected by the statute of 1822, where the execution was levied within one year, and the levy continued. Ib. 53.
3. Judgment not arrested for departure in pleading after issue joined, and verdict, where it sufficiently appears for whom judgment should be rendered. Jordan, etc. v. L. & J. James, 103.
4. Judgment on demurrer to a plea that the plea is bad, concludes the party, though on writ of inquiry the jury find the same facts in a special verdict. Bush, etc. v. Critchfield etc. 111.
5. Judgment not satisfied by a subsisting levy on land. Reynolds, etc. v. Rogers' Ex'rs, 173.

JUDGMENT—*Continued.*

6. Dormant judgment revived does not revive its lien against a purchaser before the revival. Norton *v.* Beaver, etc. 180.
7. Several judgment creditors having levies on the same land, agree that a sale shall be made on one, a good title pass, and the priority of lien be settled in a contest for the purchase money. After a fair sale, none of them can proceed upon his judgment to disturb the purchaser. Reily *v.* Miami Exporting Co. 334.
8. Judgments in United States courts in Ohio, lien on lands throughout the state. Sellers' Lessee *v.* Corwin, etc. 400.
9. Judgment in ejectment made void by an adverse recovery between the same parties; until thus made void it is conclusive between the parties. Hinton, etc. *v.* McNeil, etc. 511.
10. Judgment by confession, without process and pleadings, is not void, though erroneous. Douglass *v.* McCoy, 524.
11. Judgments of justices of the peace in Pennsylvania are not judgments of record, but are entitled to full faith and credit when proved. Silver Lake Bank *v.* Hardings, 546.

LANDS—

1. Lands vested absolutely in county commissioners may be sold by them and conveyed. Widow, etc., of Reynolds *v.* Comm'rs of Stark, 205.
2. Lands levied in execution after defendant's death, sale void. Lessee of Cartney *v.* Reed. 221.
3. Land purchased with partnership funds, and the title taken to both parties. They hold as tenants in common, and upon the decease of one partner his undivided right descends to his heirs, and being sold by administrator under order of court, the purchaser will be entitled to partition. Greene *v.* Graham, etc. 264.
4. *Scire facias* to subject lands of ancestor, in the hands of his heirs, to payment of debts, must specifically describe the lands sought to be charged. Union Bank of G. *v.* R. J. Meigs' Heirs, etc. 313.
5. In application to redeem lands sold for taxes; court of common pleas interested, case may be certified to the Supreme Court. Rawson *v.* Boughton, 328.
6. Lands sold for taxes; deed not conclusive evidence of regularity—transcript of proceedings before the auditor necessary. Carlisle's Lessee *v.* Longworth, 370.
7. A covenant for the sale of lands may be discharged by a parol contract made upon good consideration. Reed *v.* McGrew, 381.
8. Intestate's lands can not be sold by administrator, but upon an order of court, entered on the minutes, and in virtue of a law authorizing the sale, at the time it is made. Newcomb's Lessee *v.* Smith, 450; Ludlow's Lessee *v.* Wade, 501.
9. Conveyance of land described as half the tract granted to M., January 9, 1804, good *prima facie* description. McChesney's Lessee *v.* Wainwright, 453.

LANDS—*Continued.*

10. Land advertised to be sold for taxes as "original quantity one hundred and seventy—acres to be sold, seventy three." Description insufficient. Lafferty's Lessee v. Byers, 458.
11. Where proceedings have been had to condemn lands for public uses, what was necessarily transacted out of court may be proved by parol, if the paper memorandums of them can not be found. Young v. Buckingham, etc. 488.
12. Erection of a toll bridge is a public use, for which land may be condemned. Ib. 488.
13. Land, in the Virginia military district, conveyed upon entry and survey, before the patent issues, title inures to the purchaser, and is subject to execution. Douglass v. McCoy, etc. 526.

LAWYERS—

Tax upon lawyers constitutional. State v. Gazlay, 21.

LEASE—LESSEE—

Lease of a cellar and lower rooms of a house, in a town, there being several rooms above, gives the lessee no interest in the land; if the whole building is destroyed by fire, the lessee's interest is gone. Winton v. Cornish, 478.

LEGISLATIVE ELECTION—

Where the certificates of the speakers of the two houses differ, as to the christian name of the party elected to office, and no commission is issued, neither party can be admitted to fill the office. State, etc. v. Moffit, 361.

LIEN—

1. Vendor of land who takes notes with personal security for the purchase money, abandons his lien on the land sold. Williams v. Roberts, 39.
2. Judgment confessed, on process issued during the term, and execution issued within ten days, judgment entered on a subsequent day on a suit pending at the commencement of the term, execution not taken in ten days—the latter judgment attaches a preferred lien on land. Riddle v. Bryan, 50.
3. Liens of judgments, where executions were levied within one year and the levy continued, not affected by the statute of 1822. Ib. 53.
4. Purchaser of land at sheriff's sale takes the title as held by the debtor subject to prior existing liens. Ib. 55.
5. Liens upon goods unpaid for, and in transitu. Jordan, etc. v. L. & J. James, 98.
6. Liens of factors against their principals. Ib. 99.
7. Liens of consignees. Ib. 100.
8. Liens of carriers. Ib. 101.
9. The lien of a dormant judgment is not revived with it against a purchaser, after the judgment, but before the revival. Norton v. Beaver, 180.

LIEN—*Continued.*

10. Creditors having levies of execution, on the same land, agree that it shall be sold, a good title pass to the purchaser, and the priority of lien settled, in a contest for the purchase money. Party to the agreement enjoined from proceeding against the land after a fair sale. Reily *v.* Miami Exporting Co. 334.
11. Judgments in United States court, in Ohio, attach a lien on the debtor's lands throughout the State. Seller's Lessee *v.* Corwin, etc. 400.
12. Judgment not carried into execution, until after expiration of a year and day, that first levied has preference. Ib. 408.
13. Recognizance does not operate upon recognizor's lands until judgment on it. Dewit *v.* Osburn, 481.

LIMITATIONS, STATUTE OF—

1. Action of assumpsit within the statute of limitations of 1810. Williams *v.* Williams, 445.
2. The statute to be liberally construed. Ib. 445.

LITE PENDENTE—

After publication of the pendency of a suit in chancery, according to law, the suit is pending, and any disposition of the subject would be *lits pendents.* Bennet's Lessee *v.* Williams, 462.

MANDAMUS—

Where the court of common pleas refuse to proceed to the trial of a cause, *mandamus* is the proper remedy. Turner's case, 542.

METHODIST CHURCH—

The seceders from the Methodist Episcopal Church, who have organized a separate conference, and reject a bishop, are not entitled to any part of the property of the society from which they seceded. Methodist Church *v.* Wood, 288.

MILL DAM—

1. Erecting mill dam flows water back in the channel so as to raise it against the land of an adjoining proprietor; no action lies, where no actual injury is sustained. Cooper *v.* Hall, 322.
2. Mill dam across a navigable stream, erected under a law authorizing it upon certain terms, if injury be sustained in consequence, owners liable, though guilty of no negligence. Hogg *v.* Zanesville Canal Co. 414.
3. Such dam, if not kept in repair according to the provision of the law authorizing it to be erected, may be regarded as a nuisance. Ib. 421.

MONEY HAD AND RECEIVED—

1. Sale of real estate on execution, the party bidding intending only to protect previous title. Where other rights intervene the bid may be considered money in the bidder's hands, and reached in an action for money had and received. Graham, etc. *v.* Bank U. S. 266.
2. Plaintiff claiming to recover for money had and received, on the ground of rescinding the contract upon which it was paid, must be in a situation to restore that for which it was paid, or to show that the act of the defendant prevented it. Reed, etc. *v.* McGrew, 386.

MORTGAGE—

1. *Quære*, if administrator can release the equity of redemption of his intestate, except by proceeding in equity. Bank U. S. *v.* Piatts, etc. 541.
2. Form of decree for sale of mortgaged premises. Higgins *v.* West, 554.

NAVIGABLE STREAMS—

The owners of mill dams across navigable streams, erected under authority from the legislature, are liable for damages sustained in consequence of such erection. Hogg *v.* Zanesville Canal Co. 414.

NEW TRIAL—

1. It is not a ground for new trial, that observations in the judge's charge were loosely made. They must be both material and erroneous. Jordan, etc. *v.* L. & J. James, 97.
2. New trial not granted, where justice is done, that leave may be given to amend the pleadings and let in a mere technical defense. Bush *v.* Critchfield, etc. 114.
3. Not granted because against equity, if consistent with law. Bates *v.* Cooper, 117.
4. In ejectment, where the court hold the verdict to be against the weight of evidence, and the verdict is against the defendant, new trial granted. Muhlenburg's Lessee *v.* Florence, 248.
5. New trial not granted, on discovery of an additional witness to a fact upon which evidence was given to the jury. Reed, etc. *v.* McGrew, 386.
6. Where substantial justice is done, between the parties, by the verdict, new trial not granted. Hinton, etc. *v.* McNeil, etc. 513.
7. Where judgment is reversed and new trial awarded, in case of a prisoner in the penitentiary, the new trial must be had before the court where he was convicted. Turner's case, 543.

NOTICE—

1. Matter set out as defense, by way of notice under the statute, must be that which could be well pleaded in bar of the action, Reynolds, etc. *v.* Rogers' Ex'rs, 172; and must be special, in the character of a plea. Brazee, etc. *v.* Blake, etc. 346.
2. In case of divorce, where parties live in different counties, notice must be given of the pendency of the petition by publication. Harter *v.* Harter, 319.
3. Security paying portion of the debt can not sustain an action upon each payment without notice and demand. Williams *v.* Williams, 446.

NUISANCE—

Mill dams erected across navigable streams, under the provisions of a statute imposing the performance of certain acts. If these be not performed, the dam may be treated as a nuisance. Hogg *v.* Zanesville Canal Co. 421.

OCCUPYING CLAIMANT LAW—

1. This law held to be constitutional. Hunt's Lessee *v.* McMahan, 133.

OCCUPYING CLAIMANT LAW—*Continued.*

2. Actual eviction not necessary to maintain suit on covenant of warranty, where defendant claims the benefit of the occupying claimant law. King *v.* Kerr's Adm'rs, 158.
3. Purchaser upon execution entitled to the benefit of occupying claimant law. Sellers *v.* Corwin, 409.

OFFICE—

Where the law directs that a commission shall issue from the governor to any person appointed to office, the appointment can not be executed without such commission. State, etc. *v* .Moffit, 361.

PARTIES—

In a contract with canal commissioners, the state is the party of one part, and suits against the other party must be brought in the name of the state. Comm'rs Canal Fund *v.* Perry, 60.

PARTNER, PARTNERSHIP—

1. One partner deceased, the other insolvent, surety may proceed in equity against the estate of the decedent, without prosecuting a suit against the survivor. Horsey, etc. *v.* Heath, etc. 355.
2. Partnership note discounted by a bank, and renewed by one partner only, remains still a partnership debt. Ib. 356.
3. Contract between the owner of military land warrants, and a locator, to locate the warrants for a portion of the land, each contributing a share of the expense, does not constitute a partnership. McArthur *v.* Ladd, 520.

PARTITION—

1. If partition be made, under an order of court, in a suit regularly brought, and the parties take possession accordingly, and hold for several years, the partition being equitable, when made, equity will not disturb it, though no confirmation was entered on the report. Piatt, etc. *v.* Hubbell, etc. 243.
2. Purchaser, under an order of court directing the sale of a deceased tenant in common's portion of land, may proceed and obtain partition. Greene *v.* Graham, etc. 264.

PAUPERS—

1. Overseers bound to provide support for a pauper within the township, though having no residence Trustees *v.* Ogden, 24.
2. Where overseers refuse, individuals who supply support, may sustain an action for the amount against township. Ib. 26.
3. An infant pauper's residence is not changed, by the mother marrying and taking him with her to another township. Trustees of Bloomfield *v.* Trustees of Chagrin, 316.
4. New county line divides a township; though the residence of a pauper fall within the new county, the old township in the old county remains chargeable with his support. Pike Township *v.* Union Township, 529.

PENALTY—

1. An ordinance of the city of Cincinnati, authorizing the sale, as well as the seizure of powder in certain cases, without any legal adjudication, not authorized by the charter. Cotter *v.* Doty, 395.
2. An action does not lie to recover a contract penalty unless upon a specialty. Nelson *v.* Ford, 475.
3. Where a lease stipulates the payment of part of the crop as rent, under the penalty, debt does not lie for that penalty. Ib. 476.

PENAL STATUTE—

The penal laws of a sister state can not be enforced in the courts of Ohio, though the suit to enforce it be brought upon an official bond. State of Indiana *v.* John, etc. 218.

PENITENTIARY—

Where a prisoner is in the penitentiary when the judgment convicting him is reversed, he must be conveyed back to the jail of the county where he was originally convicted to be again tried. Turner's case, 543; Kazer's case, 544.

PLEADINGS—

1. Plene administravit an immaterial plea, under the laws of Ohio. Abbot, etc. *v.* Cole, etc. 87.
2. Judgment not arrested for departure in pleading, after issue joined and verdict found, if the pleading show sufficiently for whom judgment should be rendered. Jordan, etc. *v.* L. & J. James, 108.
3. Plea adjudged bad, on demurrer ,and writ of inquiry awarded. The jury of inquiry find a special verdict setting out the facts of the plea, the party is concluded by the judgment on the demurrer. Bush, etc. *v.* Critchfield, etc. 111.
4. Repleader not awarded after a trial of the merits upon an issue, on which the court can pronounce a valid judgment. Bates *v.* Cooper, 117.
5. Where a notice is substituted for a plea, it must be of matter that could be pleaded in bar. Reynolds, etc. *v.* Rogers' Ex'r, 172.
6. Declaration, upon a writ of error bond, need not aver that a writ of *supersedeas* was taken out by the plaintiff in error. Ib. 177.
7. Declaration on a lease of school lands made by township trustees must set out a case showing that the trustees had power to execute the lease. Trustees of Concord Township *v.* Miller, etc. 185.
8. In suit against securities of a removed administrator, by his successor, it is not necessary to aver that the administrator removed had notice of his successor's appointment. Treasurer of Franklin Co. *v.* McElvain, 201.
9. Declaration by *prochein ami*, but not stating plaintiff to be a minor, procuratorship held surplusage, and the plaintiff presumed of age. Hanly, etc. *v.* Levin, 238.
10. In trespass, pleas not guilty and *justification*, verdict guilty and damages assessed; without notice of the plea of justification, it is error. Ib. 238.

PLEADINGS—*Continued.*

11. Declaration against administrator and his securities must set out the facts held necessary in the case of Stewart & Chaplain *v.* Treasurer of Champaign. Treasurer of Montgomery *v.* Kemps, 241.
12. The court will not hear a cause submitted without process and pleadings. Mason *v.* Embree, 277.
13. In suit by corporation, the legal organization of the society can only be questioned by plea. Methodist Church *v.* Wood, 286.
14. In a *scire facias* to make the representatives of a deceased joint obligor party to a judgment against the survivors, it is sufficient to set forth the substance of the bond. To such a *sci. fa.*, *non est factum* is a material plea. Brazee & Carrol *v.* Blake, etc. 344.
15. Notice, with the general issue, must be special in the character of a plea. Ib. 346.
16. In replevin, plaintiff may put in double replications. Cotton *v.* Doty, 395.
17. Defense in equity, that there was a former decree on the merits, must be presented by plea; it can not be made on demurrer. Ferguson, etc. *v.* Miller, 460.
18. Action against one of several joint contractors, as upon a contract made singly, taking no notice of the other joint contractors, exception must be taken by plea in abatement. McArthur *v.* Ladd, 517.
19. *Nil debet* a good plea to an action on a judgment rendered by a justice of the peace in the State of Pennsylvania. Silver Lake Bank *v.* Harding, 546.

POSSESSION—

Possession taken by plaintiff in ejectment, after suit brought, can not avail as a defense to the action. McChesney's Lessee *v.* Wainwright, 454.

PRACTICE—

Case of practice on a particular state of facts. Oliver and Baum *v.* Pray, 326.

PRESUMPTION—

Lands patented to A. Proof that party in possession purchased the warrants upon which the patent issued, located them, took possession, and paid taxes, does not raise a presumption that a conveyance had been made. Starke's Lessee *v.* Smith, 456.

PURCHASER—

1. Purchaser at sheriff's sale of real estate takes such title as was in the debtor, subject to prior existing liens. Riddle *v.* Bryan, 55.
2. Purchaser, after notice of the pendency of a suit is duly published, is a *lite pendente* purchaser. Bennet's Lessee *v.* Williams, 462.
3. Purchaser from judgment debtor, with wife's relinquishment of dower, husband deceased, wife living, can not set up the dower as a separate estate against a preferable purchaser under the judgment. Douglass *v.* McCoy, 527.

QUO WARRANTO—

1. Mode of proceeding on *quo warranto*. Case of Bank Mt. Pleasant, 249.
2. *Quo warranto* refused, where the application was by a private individual. State *v.* Moffit, 368.

RECITALS—

Grantee bound by recitals in the conveyance to his grantor. McChesney's Lessee v. Wainwright, 454.

RECOGNIZANCE—

Recognizance as special bail, or to appear and answer a criminal charge, is no lien on the recognizor's land until judgment is had. Dewit v. Osburn, 481.

REPLEVIN—

1. Double replications may be put in by plaintiff in replevin. Cotter v. Doty, 395.
2. Powder seized as forfeited under a city ordinance may be replevied. Ib.

RESIDENCE—

An infant pauper, residing with his mother, and having a settlement in one township, residence is not changed by the mother marrying and removing with her husband to another township, taking the infant with her. Trustees of Bloomfield v. Trustees of Chagrin, 316.

ROADS—

1. Appeal lies from a judgment of a justice in suit by supervisor for obstructing roads. In such suits supervisor not liable for costs. Bittle v. Hay, 270.
2. Roads laid out and used for a series of years not to be obstructed because not exactly on the course called for in the survey, or because it can not be proven that all the steps preliminary to their establishment were regularly taken. Arnold v. Flattery, 273.

SATISFACTION—

It is not a present satisfaction of a judgment that there is a subsisting levy of execution upon it on lands. Reynolds, etc. v. Rogers' Ex'rs, 173.

SCIRE FACIAS—

1. In *scire facias* to subject the lands of a decedent, in the hands of his heirs, for the payment of debts, the lands intended to be charged should be specifically described. Union Bank G. v. Meigs' Heirs, 313.
2. *Scire facias* to make the representatives of a joint obligor party to a judgment against the survivors, it is sufficient to set forth the substance of the bond, and on the plea of *non est factum* it is unnecessary to produce the judgment or evidence of the breach, or the amount of damages. Brazee & Carrol v. Blake, etc. 344.

SLANDER—

1. Upon plea of justification in slander, and an attempt to prove it, evidence may be given of plaintiff's general bad character, but not of his character in any particular. Dewit v. Greenfield, 225.
2. Words spoken after commencement of the term, but before action brought, declaration generally of the term. No exception allowed. Ib. 227.

SUIT—

Under the law of 1795 for the settlement of intestates' estates, application of the administrator to sell lands was not a *suit* in the received sense of the term. Ludlow's Lessee v. Wade, 504.

SURETY—

1. Where surety undertakes that principal shall sell and account for price of all goods furnished by B., and settlement is made, balance found due, and a note taken for it from the principal, the surety is not discharged. Bush, etc. *v.* Critchfield, etc. 113.
2. Surety in a writ of error bond may be proceeded against without suing execution against the principal. Reynolds *v.* Rogers' Ex'rs, 175.
3. In a bond on writ of error to judgment reviving a dormant judgment, surety liable for the judgment revived. Ib. 175.
4. Surety of a removed administrator, who has settled his account, and the balance in his hands is ascertained, may be proceeded against without suit against the principal. Treasurer of Franklin Co. *v.* McElvain, 201.
5. Surety discharged where the creditor, without the assent of the surety, suspends his right to proceed against the principal. Bank of Steubenville *v.* Adm'rs of Carrol, 214.
6. After judgment against the surety and principal, if the creditor give time to the principal, at the request of the surety, no ground of discharge for the surety. Baldwin *v.* Western Reserve Bank, 274.
7. Surety for partners, where one is deceased and the survivor insolvent, may proceed against the estate of the deceased, in equity, without prosecuting a suit against the survivor. Horsey, etc. *v.* Heath, etc. 355.
8. Where surety voluntarily pays the whole debt, an action accrues, from the time of payment, without notice or demand; but none accrues upon a partial payment without notice and demand. Williams' Adm'rs *v.* Williams' Adm'rs, 445, 446.
9. An original liability, as security subsequently secured, by a conveyance of land, can not be so connected with the conveyance as to create an equity before the conveyance made. Douglass *v.* McCoy, 526.

TAXES—

1. Tax upon lawyers constitutional. State *v.* Gazlay, 21.
2. Tenant for life without improvement for waste, suffers the land to be sold for taxes, forfeits his estate, and the reversioner may recover in ejectment. McMillan's Lessee *v.* Robbins, 30.
3. The law forfeiting tenant's estate for non-payment of taxes is constitutional. Ib. 33.
4. Land sold for taxes, reversioner has the right to redeem. Ib. 33.
5. Tax collector, justifying as such, need not prove his appointment and qualifications—proof of acting and general reputation sufficient. Eldred *v.* Sexton, 216.
6. Where, on application to redeem lands sold for taxes, the judges of the common pleas can not sit, case may be certified to the Supreme Court. Rawson *v.* Boughton, 328.
7. Deed for land sold for taxes not evidence without transcript of proceedings from the county auditor's books to sustain it. Carlisle's Lessee *v.* Longworth, 370.

TAXES—*Continued.*

8. Land advertised to be sold for taxes, describing the tract as "original quantity, 170; acres to be sold, 73," insufficient description. Lafferty's Lessee *v.* Byers, 458.

TAVERN KEEPER—

Person who makes it a business to keep a house of entertainment, for travelers, is a tavern keeper within the statute, though he keeps no liquor in his house for any purpose. Curtis *v.* The State, 325.

TOLL BRIDGE—

The erection of a toll bridge is a public use, for which lands may be condemned. Young *v.* Buckingham, etc. 488.

TOWNSHIP—

1. Township must support casual paupers found in it and requiring support. Trustees *v.* Ogden, 24.
2. Where the overseers of the poor refuse to support, an individual who supplies it may maintain an action against the township. Ib. 26.
3. Suits by township trustees should be in the name of the corporation. Trustees of Concord Township *v.* Millan.

TRESPASS—

Party who advises or aids in committing a trespass may be subjected in an action of trespass, though not present when committed. Bell *v.* Miller, 251.

TRIAL—

Two joined in one indictment, one only arraigned, tried, and convicted. Held not to be error where an order for separate trial was made and can be justly inferred from the record, though not distinctly set out. Hess *v.* Ohio, 10.

TRUST—

1. Trust in real estate might be created by parol, and proved by parol evidence, previous to the statute of frauds of 1810. Fleming, etc. *v.* Donahoe, etc. 256.
2. Where trust is raised by implication only, the *cestui que* trust may maintain ejectment against the trustee. Starke's Lessee *v.* Smith, 457.

TRUSTEES—

Assignees of an insolvent debtor, where the assignment is declared void, are held as trustees of the fund, subject to the direction of the court. Atkinson & Rollins *v.* Jordan, Ellis & Co. 294.

VARIANCE—

Charged in the declaration that a boat was wrecked passing over a mill dam. Proof that in crossing the dam the boat was rendered unmanageable, and was wrecked upon the pier of a bridge below. No variance. Hogg *v.* Z. C. Co. 423.

VENDOR—

Where vendor of land takes notes with personal security for the purchase money, he does not retain his lien on the land sold. Williams *v.* Roberts, 39.

VOLUNTARY CONVEYANCE—

1. Voluntary conveyances not to be favored as against creditors. Brice *v.* Myers, etc. 122.
2. Made by a father indebted or liable to damages on a contract, to children, embracing most of his estate, though not with intent to defraud at the time, held fraudulent against a creditor where necessary for his security. Ib. 126.

WATER POWER—

Water once taken into the canals becomes the property of the state for water power as well as navigation. Cooper *v.* Williams, 391.

WARRANTY—

1. Until eviction covenant of warranty passes to heirs or assignees. King *v.* Kerr's Adm'rs, 155.
2. The holder of the covenant at the time of eviction may have an action against every intermediate warrantor, but can have only one satisfaction. Ib. 157.
3. The actual loss the rule of damages. Ib. 157.
4. Warrantor not entitled to notice of the suit on which the recovery is had. Ib. 158.
5. If plaintiff ask benefit of the occupying claimant law, warrantor can not insist on actual eviction. Ib. 157.

WILLS—

1. *Feme covert* can make a will under the statute of Ohio. Allen et al. *v.* Little, 67.
2. Issue out of chancery to try the validity of a will, defendant's answer is not evidence. Green *v.* Green, 278.

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